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REPORTS
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature,
AND IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND
THE CORRECTION OF ERRORS,
IN THE
STATE OF NEW-YORK.

BY WILLIAM JOHNSON,
COUNSELLOR AT LAW.

VOL. IX.

Third Edition; with additional Notes and References.

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JUDGES

OF
THE SUPREME COURT OF JUDICATURE
OF
THE STATE OF NEW-YORK,

DURING THE TIME OF
THE NINTH VOLUME OF THESE REPORTS

JAMES KENT, Esq. *Chief Justice.*
SMITH THOMPSON, Esq.
AMBROSE SPENCER, Esq.
WILLIAM W. VAN NESS, Esq.
JOSEPH C. YATES, Esq.

Attorney General.

MATTHIAS B. HILDRETH, Esq. *who died 11th July, 1812.*
THOMAS ADDIS EMMET, Esq. *appointed 12th August, 1812.*

DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the sixth day of April, in the thirty-seventh year of the Independence of the United States of America, WILLIAM JOHNSON, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Trial of ~~Impeachments~~ and the Correction of Errors, in the State of New-York. By William Johnson, Counsellor at Law. Vol. IX."

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THERON RUDD,

Clerk of the District of New-York

Entered according to Act of Congress, in the year eighteen hundred and fifty-eight

BY BANKS & BROTHERS,

in the Clerk's Office of the District Court of the Southern District of New York.

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CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN JANUARY TERM, 1812, IN THE THIRTY-SIXTH YEAR OF OUR
INDEPENDENCE.

CLARKSON AND OTHERS *against* THE PHOENIX INSURANCE COMPANY.

THIS was an action on two policies of insurance on goods laden on board the ship *Governor Gore*, *Waddle*, master, on a voyage from *New-York* to *Tonningen*; "warranted *American* property, proof to be required here only; also, not to abandon, if captured, until six months after notice, unless previously condemned, nor if refused admittance or turned away, but may proceed to another near open port."

*At the trial, the interest of the plaintiffs was admitted, and that the ship and goods were *American*, and duly documented. The ship sailed on the voyage the 21st *February*, 1810. On the twenty-fourth *March* she was met by a *British* cruiser, who examined her papers and permitted her to proceed; and was again met by another *British* cruiser, on the thirty-first *March*, who permitted her to proceed, after examining her papers. She was, afterwards, on the thirty-first *March*, captured by a *French* privateer and carried into *Calais*. The ship and cargo were libelled in the imperial council of prizes at *Paris*, under the *Berlin* and *Milan* decrees, and the captors demanded a condemnation; 1. Because, since those decrees, the ship had made a voyage to *England*; 2. Because she had submitted to two visits from *English* vessels of war; 3. Because the certificates of origin on board were irregular. The captain caused a claim to be put in, by the *American* consul-general and agent of prizes at *Paris*, in behalf of the owners. The counsel consulted by the master, were of opinion that the ship and cargo would certainly be condemned, under the *Berlin* and *Milan* decrees; and the *American* consul-general, by letter, and afterwards, personally, advised

Policy of insurance on goods from *New-York* to *Tonningen*, "warranted not to abandon if detained or captured, until six months af-

[* 2]
ter notice, unless previously condemned, nor if refused admittance or turned away, but may proceed to another near open port."

During the voyage, the vessel was boarded by *British* cruisers, who, after examining her papers, allowed her to proceed. She was afterwards captured, on the 31st *March*, by a *French* privateer and carried into *Calais*. The vessel and cargo were libelled in the council.

ALBANY,
January, 1812.

CLARKSON
v.
PHENIX INS.
Co.

of prizes at *Paris*. The master was advised by counsel, by the *American* consul-general and agent of prizes, and by the *American minister*, that the property would certainly be condemned, under the *Berlin* and *Milan* decrees, and that he ought to attempt a compromise with the captors. The master made a compromise, and on being paid about one fourth of the

[* 3]

value of the vessel and cargo, he abandoned them to the captors.

The insured received advice of the capture on the 26th *May*, and gave immediate notice thereof to the insurers, and on the 26th *November*, made an abandonment for a total loss.

The compromise was made on the 26th *July*, by the master, who was part owner of the ship, and he acted *bona fide*, and for the benefit of all concerned, but without any express authority, and his acts were not adopted or ratified by the insured. It was held, that the

the captain to make a compromise with the captors, as, in his opinion, the property would certainly be condemned. The same opinion and advice were also given to the master, by the *American minister* at *Paris*. The *American* consul, at *Calais*, also advised the captain to compromise with the captors, and save as much as he could. The master being thus advised by all the persons he consulted, that the property must inevitably be condemned, and that he ought to attempt a compromise, made overtures to the captors for that purpose; and to induce them to favorable terms, he represented to them that he would prove that the capture was made by the privateer, while under *British* colors, contrary to the laws of *France*, in consequence of which the proceeds of the prize would be taken wholly by the government. A written agreement was made, on the 25th *July*, 1810, between the master and the captors, by which the latter stipulated to pay fifty thousand francs, provided it should be ratified by the council of prizes, and to be paid out of the proceeds of the sales of the ship and cargo, and the master ceded and abandoned them to the captors. By a private agreement with the captain, the captors were to pay fourteen thousand francs more. The public contract having been ratified by the council of prizes, both sums were paid to the master. The plaintiffs and defendants both refused to receive the money, which amounted to about twenty-five *per cent.* on the ship and cargo; and the same remained ready to be paid to whoever should be entitled to receive it. In making this compromise, the master acted entirely with the knowledge and advice of the *American* consul-general and agent of prizes; and of the *American* minister, the former of whom signed the contracts with the captors. The plaintiffs had no agent or consignee at *Calais*; and the goods were not consigned to the master, nor had he any other authority, in relation to them, than what resulted from his being master of the ship.

It was admitted that the master, who was owner of one fourth of the ship, acted throughout in good faith, and in a manner which he believed to be for the interest of all concerned, and without knowledge of any insurance having been made.

Advice of the capture was received by the plaintiffs, on the 26th *May*, 1810, and on the same day they gave notice thereof to the defendants, and on the twenty-sixth *November*, made an abandonment to them of the property. The defendants refused to accept the abandonment, supposing themselves discharged by the act of the master in ceding the property to the captors, before the plaintiffs had a right to abandon.

A verdict was found for the plaintiffs, subject to the opinion of the court on a case containing the above facts. It was agreed, that if the court should be of opinion that the plaintiffs were entitled to recover, the amount should be liquidated by

two persons to be appointed by the court; and that either party might turn the case into a special verdict.

P. A. Jay, for the plaintiffs. A master acting *bona fide*, for the interest of all concerned, cannot, by his acts, vacate the policy. In the case of *Jumel & Desobry v. The Marine Insurance Company*, (7 *Johns. Rep.* 412,) a compromise made by the master, after an abandonment, did not affect the right of the insured to recover for a total loss. The question now is, whether such a compromise, made before an abandonment, can alter or prejudice the rights of the insured. It is for the interest of all parties that the master should have the power to act for the benefit of all concerned. At the time of the capture, the master was, by law, the agent of both parties, and a joint agent cannot, by his acts, change the relation of his principals, or vary their rights.

Again, by the capture, the right of abandonment became vested, and must continue, until divested by a restoration of the property, or by some act of the insured, or their authorized agent. It cannot be pretended, in this case, that the plaintiffs had any control over the master, who was necessarily as much the agent of the defendants as of the plaintiffs. (2 *Caines*, 301. *Wm. Bl.* 313.) It is admitted that he acted in good faith. Will it be said that he acted ignorantly or foolishly? It is enough that he acted according to his best judgment, and the best advice which could be obtained. (1 *Term Rep.* 608, and *note. Plantamour v. Staples. Mills v. Fletcher, Doug.* 231.) Can it be said that, under the circumstances of the case, he did not act well?

It may be said, that the plaintiffs could make no abandonment; because, having parted with all their property, they had nothing to abandon. If so, then an act of abandonment was equally unnecessary as if the vessel had been wholly lost at sea. But an abandonment relates back to the time of capture. The clause in the policy merely suspends the exercise of the right of abandonment for six months.

It will, perhaps, be said, that the defendants have, by the compromise with the captors, been deprived of their right to claim compensation from the *French* government; but as the compromise was ratified by the council of prizes, any claim against the government must remain unimpaired.

Hoffman and *T. A. Emmet*, contra. This is the first of a new class of cases on the subject of compromises. The cases to be found in the books are different, and the doctrine derived from them cannot be applicable to the present case. The plaintiffs demand a total loss, and if they cannot recover for that, they are entitled to nothing. In *Berens v. Rucker*, and the other cases of compromise, which have been cited, the insurers were held liable to pay the charge of a compromise,

(a) *Acc. Waddell v. Columbian Ins. Co.* 10 *Johns. Rep.* 67. The warranty as to abandonment is restricted to capture and detention. *Ordan v. Columbian Ins. Co.* 10 *Johns. Rep.* 273.

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master was, from necessity, the agent of both parties, and his acts could not prejudice either; that the capture created a valid cause of abandonment; that the written clause merely suspended the exercise of the right for six months, or until a condemnation, and, at the expiration of

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that time, the abandonment being duly made, had relation back to, and took effect from, the capture, as a technical total loss.

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bona fide made, to prevent condemnation, or to avoid a greater expense. The compromise was to save or regain possession of the property, not to abandon it to the captors. The insured or the master, acted under the clause in the policy, which permits them to labor, &c. for the preservation of the property. This clause furnishes the true test of the master's authority and while he acts for its preservation, a compromise made in good faith, for that purpose, is binding on the insurers; but where the compromise is made, not to save or recover the property, but for its loss, beyond the possibility of restoration, it cannot come within the scope of the authority given by that clause.

Prior to an abandonment, or a valid cause of abandonment, the master cannot, by his acts, turn a partial into a total loss, nor a total into a partial loss. Insurers are not answerable for the mistakes or faults of the master, prior to an abandonment, nor for any errors of judgment.

Then, whose agent was the master? If he was the agent of neither, then the insurers are not responsible for his acts; and admitting he was the joint agent of both parties, and acted beyond the scope of his authority, though *bona fide*, still the question recurs, and always must recur, are the insurers answerable?

To ascertain the time when the master becomes the agent of the insurers, we must fix the time when the property was transferred to them. Until the property is actually transferred, or the insured have a right to transfer it, the property cannot be said to belong to the insurers, and the master cannot be their agent in respect to it.

Then, what is the true construction of the clause in the policy, which says, that the insured shall not abandon, in case of capture or detention, until after six months, or until after condemnation? It is true that an abandonment relates back to the just cause of such abandonment; but it is begging the question, in this case, to say, that the capture was the just cause of abandonment. By this agreement of the parties, no right to abandon, in case of capture or detention, could exist, until after a condemnation, or a detention for six months. It is not capture alone that gives the right to abandon, but there must also be a condemnation or detention for six months. The contract in this clause is explicit, that the insurers are not to be answerable for a capture or detention which does not last six months, or is not followed by a condemnation. If the vessel is released before the end of six months, the capture or detention is a nullity. No technical total loss, and, consequently, no right of abandonment, can exist, until after a detention of six months, or a condemnation. Then, until the contingency happens which gives the right of action against the insurers, and fixes the rights of the parties, the master cannot be deemed the agent of the insurers, or of both parties, by

necessity. But previous to such event, the master transferred the property to the captors. If the plaintiffs had done this, surely they could not claim for a total loss. The case of *Jumel & Desobry v. The Marine Insurance Company*, is not applicable to the present case.

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This is not the case of a compromise, by way of *ransom*, like those which have been cited; it is an agreement, by way of sale or transfer of the property to the captors.

The property was, in fact, sold, and the capture and arrest *withdrawn and at an end, several months before the abandonment was made. There was a complete relinquishment of the subject; an abandonment of the voyage. The voyage was broken up, not by reason of a peril insured against, as in the case of *Mills v. Fletcher*, but by a sale of the subject. When the abandonment was, afterwards, made, the defendants had a right to say to the plaintiffs, "the policy is at an end. The property has been sold by the master, and the voyage abandoned."

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If capture alone does not furnish a valid cause of abandonment, then this case is not to be distinguished, in principle, from that of *Craig v. The United Insurance Company*. (6 *Johns. Rep.* 226.) There is no difference between the abandonment of the property, for fear of a condemnation, and an abandonment of the voyage, for fear of capture.

Again, the master had no right to deprive the parties of any claim, through the government, for a restoration of the property. It is well known that many vessels captured under the *Berlin* and *Milan* decrees have been restored. By the compromise, all ground for a claim to restoration has been taken away. There has been a complete relinquishment of the rights of the parties; and the insurers were entitled to have the right to a chance of restoration, transferred to them by the abandonment.

Harrison, in reply. When new cases arise, and the principles of former decisions are applicable, the court will make the application; and if new principles of decision must be resorted to, the court will lay them down. The *French* decrees are new and unprecedented; and, by those decrees, this vessel and her cargo, sailing lawfully and innocently, as a neutral, must have inevitably been condemned, for having been visited by a *British* cruiser. The prize courts of *France*, sitting and acting under those decrees, were bound to condemn the property, and leave the injured party to seek redress through his own government. There would be the same ground for a reclamation against the government, in this case, as in every other, arising under the law of nations.

It was a matter of indifference to the master, whether the *French* government or its citizens got the property, since the condemnation was certain. He made the best use of circum-

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stances to compromise with the captors, and save a plank from the general wreck.

The principle which is to govern in this case does not arise out of the clause in the policy, giving the insured leave to labor for *the safety and preservation of the property. It arises from the power resulting to the master, from necessity, to act for the benefit of all concerned ; and his acts, done *bona fide*, are binding on all. Does the right to ransom or compromise, after capture or abandonment, result from the general clause in the policy ? In *Berens v. Rucker*, that clause is not alluded to. It is put on the broad ground of the necessity of the case, arising from the situation in which the property was placed.

The cases of ransom proceed on the same principle, and are perfectly analogous. A ransom may be made either by agreeing to pay a sum of money for the whole of the property, or that the captors should retain a part, and release the residue.

The written clause in the policy, as to an abandonment, merely suspends the exercise of the right, and leaves the parties, in every other respect, precisely in the same situation as if no such clause had been inserted. Can it be pretended that every thing which intervenes, during the six months, is to be at the risk of the insured ? If within the six months the property is restored, so that the insured has the full and free use of it, then his right to abandon ceases ; but if by the act of the master, or for any other cause, the property is not fully restored, then the act of abandonment has relation back to the time of capture. Suppose the property, after the capture, and before the expiration of six months, had been destroyed by an armed force, or had been redelivered on bonds ; or suppose the master had paid three-fourths of the property for liberty to proceed to *Tonningen*, would not the insurers in all these cases have been liable ? There is no substantial difference between the present and either of the cases supposed.

In this point of view, it is unnecessary to enter into a very nice examination of the doctrine of agency. Whatever the master does after the accident, and before the insured have an opportunity to give him instructions, will not prejudice them.

Suppose the master to be the agent of neither party, then his act may be considered as *tortious* as the intermeddling of a stranger, for which the insured are not liable. The capture was a valid ground of abandonment, and the property remaining for six months after, without being restored, the abandonment has a full and complete effect.

Again, the plaintiffs have a just claim, at least, for an indemnity for a partial loss, or for three-fourths of their property. Compromises have been allowed and sanctioned by courts whether with good policy or not, it is unnecessary now to inquire.

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*This case is wholly different from that of *Craig v. The*

United Insurance Company. Here was no idle or hasty fear of an intermediate capture. A capture had taken place, and there was, according to the judgment and belief of the best informed men, a moral certainty of condemnation; and if the compromise had not been made, it was equally certain that no part of the property would have been saved.

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Per Curiam. The capture in this case created the total loss, and the special stipulation in the policy only suspended, for six months, the general right to abandon. At the expiration of the time, the abandonment was duly made, and it related back to the capture, and took its operation and effect from that loss. The only question is, whether the act of the captain, in the intermediate time, destroyed or impaired the plaintiffs' right. During the interval of time between the notice of the capture and the abandonment, the property remained in the hands of the captors without restoration, and the captain, acting with good faith, and upon the best advice that could be obtained, entered into a composition with the captors, and abandoned the property, upon payment of twenty-five *per cent.* The parties to the policy neither authorized, nor have since adopted, the act of the captain; but as he was, *ex necessitate*, the mutual agent of both parties during that time, to do what was right, his acts, done in good faith, and for the benefit of all concerned, could not prejudice the rights of either under the contract. The doctrine laid down by Lord Mansfield, in *Mills v. Fletcher*, (*Doug.* 231,) was to this effect. The captain, in that case, had no authority but what was implied in his general trust as master of the vessel, and after a capture and recapture, and while the consequence of the capture rendered the case an extreme one, the master sold the vessel and cargo prior to an abandonment, and the court put the cause upon this point, whether the captain had acted with good faith and for the benefit of all concerned, and as there was no doubt of the fact, the assured recovered a total loss. This case is within the principle of that decision. There is every reason to believe that the composition in this case was prudent, and most for the interest of the parties to the policy; and there is no ground for a distinction between a composition by which the subject, or a portion of it, shall be specifically restored, or an equivalent given for the subject itself. The question never turns upon the mode, or nature, or value of the composition, but upon the prudence or integrity of the act.

*The abandonment being supported by the capture, and resting upon it, by relation, the benefit of the intermediate composition belongs to the defendants and not to the plaintiffs, and they must look for their proportion of it to the master. The plaintiffs are entitled to recover as for a total loss, to the extent of their interest insured.

Judgment for the plaintiffs.

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BRADHURST and FIELD *against* THE COLUMBIAN
INSURANCE COMPANY.

If a ship, in a case of extremity, be voluntarily run ashore, and is afterwards recovered and performs her voyage, the damages resulting from the stranding are to be borne as general average.

But if, by the act of running her ashore, the ship is destroyed and totally lost, but the cargo saved, this is not a case of general average, and the cargo is not bound to contribute. (a)

THIS was an action on a policy of insurance on the ship *Dean*, dated the 22d *July*, 1809, from *New-York* to *Bremen*, with liberty to touch at *Amsterdam*, or *Rotterdam*, or *Tonningen*, for a market; if turned away, to have liberty to go to a near open port, where she may be admitted; valued at 3,000 dollars, the sum insured, being one half the ship; "warranted *American* property; if captured or detained, the insured not to abandon, if the property is released in six months after advice is received here and notice thereof; *free from seizure in port.*" The plaintiffs averred a loss by the perils of the sea.

The cause was tried at the *New-York* sittings, in *June*, 1811, before Mr. Justice *Thompson*. The interest of the plaintiffs, and the abandonment were admitted. The property was *American*.

By the deposition of the master, which was read in evidence, it was proved, that the *Dean* was seaworthy when she sailed from *New-York*, on the 29th *June*, 1809. The cargo consisted of sugar, coffee, cotton, drugs and medicines, and various other articles shipped by the plaintiffs and others. During her voyage, on the 16th and 17th of *July*, the ship met with violent gales of wind and heavy seas, which caused her to spring a leak. The weather continued tempestuous until the twenty-sixth, and the leak continued to increase, so as to require all hands constantly at the pumps. Finding it impossible to keep the ship free, the captain, with the advice of the crew, determined, on the 1st of *August*, to put into the nearest port, for the preservation of the ship and cargo, as well as the lives of the crew; and being off the coast of *Holland*, he put into the *Texel*. On his arrival there, he found an embargo had been laid by the government. The ship went into the harbor of *New Diep*, where she was immediately repaired and her leaks stopped, so that she was ready for sea, and would have proceeded on her voyage, had she not been detained by the embargo. On the 23d *August*, the ship, with near twenty others, lying in the *Texel* and *New Diep*, was ordered, by the government, to *Amsterdam*, and proceeded towards that place. She arrived at *Durgendam* the 30th *August*, and was detained there by an armed ship, until the 8th *September*, when the embargo was raised, and the ship, with her cargo, was permitted to proceed to sea. While the ship lay at *Durgendam*, the master received a written order from the government, dated the 4th *September*, requiring him to deliver out of the ship, to the bearer of the order, twenty-five boxes of *Peruvian* bark, and under that order, the master, against his will, delivered the bark. On the 9th

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(a) But where, on the stranding of the ship, which is totally lost, the cargo is saved by means of lighters, the expenses of salvage are general average. *Heyli-ger v. New-York Firemen Ins. Co.* 11 *Johns. Rep.* 85.

September the ship proceeded back, and reached the *Texel* on the fourteenth, when she was brought to by an armed ship, and obliged to continue at anchor under her guns, without having any communication with any other vessel, or the shore, during four days, which detention was by an order or regulation of the government. On the 19th *September*, while the ship was so detained, a violent storm arose; the ship drifted from her anchors, and being in danger of running foul of several other vessels which were adrift, the master, after consulting the pilot and the officers and crew, and with their advice, and as the only means of extricating themselves from their dangerous situation, and of preserving their lives and the ship and cargo, determined to cut the cables and run the ship on shore. Having cut the cables, the ship was steered for the *Zuydwall*, on approaching which she struck and beat with great violence, and having no anchors or cables, she was driven, by the violence of the wind, high on the shore. The ship was greatly injured by the stranding; and, in the opinion of the master, it was impossible to get her off. On the 26th *September*, there was a government survey of the ship, and the surveyors were of opinion that there was hardly any probability that the ship could be got off; and if, by any extraordinary storm, which might occasion a rise of water, she could be got off, she was so much damaged, that the cost of repairs would far exceed her value when repaired. Leave was obtained from the government to sell the ship; but it did not appear how she was disposed of afterwards.

From the time of the stranding to the 25th *September*, the crew were engaged in discharging the cargo on board of lighters, employed by the master. About fifty hogsheads of the sugar were damaged and partly dissolved by sea-water, in consequence of the *leaks. Some of the drugs were also damaged. The lighters with the goods proceeded to the *Texel* harbor, where they were detained by the embargo, and on the arrival of the cargo at *Amsterdam* in the lighters, it was seized and taken possession of by the officers of the government, and put into the government stores, where it was detained, by the government, when the master left *Holland* for the *United States*, on the 13th *October*.

When the ship first arrived in the *Texel, Field*, the supercargo, went up to *Amsterdam*, to obtain permission for the ship to go into the *New Diep*, in order to be repaired, as the *American* vice-consul, at the *Texel*, informed the master that such permission could not be obtained elsewhere. On the 13th *August*, permission was given to the master, by an officer of a ship of war, for the *Dean* to go into *New Diep*, and the ship was repaired the day after. The master also deposed, that it was his intention to have proceeded directly to *Bremen*, and not to touch or land any part of the cargo in *Holland*. That the *Dean* was not consigned to any particular place or

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person, but the cargo was under the management of *Field*, the supercargo, who also had the direction of the ship, so far as respected her place of destination; that the cargo was seized, after it had been put on board of lighters, on its arrival in the *Texel*, under the *Dutch* decree of the 31st July 1809.

One of the bills of lading was for twenty-five chests of *Peruvian* bark, and a hogshead and tierce of merchandise, to be delivered at *Bremen*, dangers of the sea only excepted, to Messrs. *W. & S. Willinck*, of *Amsterdam*; and it appeared that on the petition of Messrs. *W. & S. Willinck*, an order was obtained from the commissary general and director of the marine, to land the bark; which was accordingly done; and Messrs. *Willinck* certified, on the back of the bill of lading, that the twenty-five chests of bark had been delivered to them, by order of the government, for which they paid the freight; but the hogshead and tierce of merchandise was to be delivered at *Tonningen*, &c.

By the bills of lading of the rest of the cargo, it was to be delivered at the port of *Bremen*, to the order of the shippers.

By the instructions of the plaintiffs to the master, he was directed to proceed to *Bremen*, or to such port or ports as Mr. *H. W. Field*, the supercargo, might advise or direct, they giving to him all their authority to act for the best in his power, for the sale of their property consigned to him.

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In the protest of the master, made at *Amsterdam*, he stated that *after the ship was on shore, the cargo was unloaded, with a view to be sent to his correspondents at *Amsterdam*, but the whole cargo, (except twenty-five boxes of *quinquina*, which, by a special order of the government, he had been obliged to deliver,) he had been, against his will and expectation, obliged to deliver into the king's stores at *Amsterdam*.

It appeared that the defendants were also insurers of goods of the plaintiffs, on board of the same vessel, for about 5,000 dollars, and goods for other shippers were insured to the amount of about 26,000 dollars. The master knew of no insurance, until after the loss.

The jury found a verdict for the plaintiffs, subject to the opinion of the court on a case containing the above facts.

The whole of the above facts are not stated as relative merely to the action on the policy on the *ship*, but with a view to the two succeeding cases on the *freight* and *cargo*, for the same voyage.

Colden, for the plaintiffs. The plaintiffs claim a total loss by the perils of the sea; and it is not easy to imagine what ground of defence can be maintained by the defendants. It is understood, however, that it will be contended, that this was a case of general average to which the goods saved ought to contribute. But here was no voluntary and deliberate sac-

rifice of a part for the safety of the whole. It was a voluntary stranding, followed by a shipwreck or total loss, which is never a case of general average. (1 *Emerigon*, 164. 668. 670.) If the ship had been got off, the expenses of getting her off might have been general average. But supposing it was a case for a general average, yet, according to the decision of this court in *Maggrath & Higgins v. Church*, (1 *Caines' Rep.* 196,) the plaintiffs are entitled to recover the whole amount of the loss of the defendants, in the first instance, and they must look to the goods for the contribution.

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C. I. Bogert and *S. Jones*, jun. contra. The vessel was not driven on shore by the storm, but the captain, on consultation with the crew, cut her cables, and run her on shore, for the general preservation of the ship and cargo, and the lives of the men. It was a voluntary stranding, for the sake of greater safety. The vessel was not totally lost. She remained high and dry on the shore; and it was a question whether she could have been repaired.

Suppose the whole cargo had been thrown overboard, to save the vessel and the lives of the crew, would it not be a case of general average, as much as if there had been a *jettison* of part of the cargo only? To constitute a case of general average, it is sufficient that the subject has been voluntarily sacrificed for the general safety.

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The case of *Maggrath & Higgins v. Church* does not apply; for here the plaintiffs are owners of the vessel, freight, and goods. (*Jumel & Desobry v. Marine Ins. Co.* 7 *Johns. Rep.* 412.) The defendants, therefore, are entitled to have the general average stated, and the amount which the cargo is to contribute deducted.

D. B. Ogden, in reply, observed, that where a ship is totally lost by one and the same peril, in whatever manner it may happen, it cannot be a general average. No such case can be found in the books. All the writers speak of a *damage* or partial injury. A loss which does not conduce to the preservation of both ship and cargo, is not an average loss. It must appear that the ship and the rest of the cargo were, in fact, saved. (*Marshall*, 537. 542.)

In the case of *Jumel & Desobry v. Marine Insurance Company*, the court proceeded on the ground of the insured being the owner of the *whole cargo*, as well as of the vessel and freight. Here the plaintiffs owned only about *one sixth* of the whole. This case, therefore, comes within the principle of *Maggrath & Higgins v. Church*.

KENT, Ch. J. delivered the opinion of the court. The loss of the ship is to be attributed to the perils of the sea. She was forced into the *Texel*, by distress and danger, arising

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from tempestuous weather; and when she was ready to depart, she was stranded and lost in consequence of a storm. The only real question in the case is, whether the loss of the ship is to be borne as a general average, to which the plaintiffs, as owners of a portion of the cargo, as well as of ship and freight, are to contribute. But the better opinion is, that this is not a case for contribution, and that there is to be no deduction from the verdict. The cable of the ship was cut after consultation, as necessary to extricate her from a perilous situation, and as best to be done for the preservation of the vessel, cargo and crew. Had the vessel been saved by this means, the loss of the cable would have formed an *item* for a general average. But it appears that after the cable was cut, they steered for the *Zuydwall*, and that on approaching it, the ship struck and beat with great violence on the ground, and was driven high on shore by the storm. Upon a subsequent survey of the ship, the surveyors were of opinion, and in which the captain concurred, *that there was "hardly any probability" that the ship could be got off, and that if she could, she was so much damaged, that the costs of repairing her would "far exceed" what would be her value after she should be repaired. What became of the ship afterwards does not appear. Here was not only a loss of the voyage, but there is every reason to conclude that there was a total physical loss of the ship, by means of shipwreck. The cargo was principally saved uninjured. It was further stated in proof, that when the ship's cable was cut, it was with the intention, and for the purpose, of running her on the *Zuydwall*, which was accordingly done.

If a ship, in a case of extremity, and to avoid impending danger, be voluntarily run ashore, and she is afterwards recovered and performs the voyage, the damages resulting from this sacrifice are to be borne as general average. There cannot be a doubt as to the existence of this rule; for it is to be met with in all the books that treat of contribution. But another and more difficult question is, whether there is to be a contribution from the surviving cargo, if the ship should happen (as in this case) to be destroyed and lost by the act of running her ashore. The question does not appear ever to have arisen in the *English* courts, and we must have recourse to those foreign works which, in the absence of *English* decisions, are the best and most authentic evidence of the maritime law. The books, in general, have not treated this point with sufficient perspicuity and precision; but from a view and comparison of them, it is pretty evident that the weight of authority, no less than the reason of the rule, is against the contribution. The marine ordinances and writers on maritime law mention general average as being confined to the damage which the vessel so run ashore may have sustained, and the expenses of setting her afloat; and it seems to be assumed as a settled

principle, that there is to be no contribution, unless the ship is eventually saved.

The language of the *Rhodian* law leads very strongly to this conclusion, and this is the text upon which most of the authorities are founded. *Amissa navis damnum collationis consortio non sarcitur per eos qui merces suas naufragio liberaverunt : nam hujus æquitatem tunc admitti placuit, cum jactus remedio cæteris in communi periculo, salva navi, consultum est.* (Dig. 14. 2. 5.) There is nothing in any part of the *Lex Rhodia de Jactu*, which countenances the idea of average, when the ship is lost, and yet the authority of some respectable *Dutch* civilians is in favor *of contribution, not only if the vessel be voluntarily run ashore and injured, but if she be totally lost ; and this contrariety of opinion cannot but excite some doubt and embarrassment, in searching for the true rule on this occasion. *Voet*, in his commentaries on the *Roman* text, (*Com. ad Pand. lib. 14. tit. 2. s. 5.*) speaks of the rule of contribution as applying to this very case of a ship run ashore, after consultation, for the preservation of the cargo, and the ship lost. *Bynkershoeck* (*Quæst. Jur. Priv. lib. 4. c. 24. de Jactu*) leaves us to infer, that, in his opinion, also, the cargo ought to contribute, in a like case ; and he cites and condemns a decision of the maritime judges of *Amsterdam*, in which they say that there is to be no contribution, unless the ship so voluntarily run ashore, be saved. This opinion of the *Dutch* judges, I still apprehend, contains the true construction of the *Rhodian* law ; and it is to be observed, that *Bynkershoeck* does not clearly distinguish between the case of a ship that is voluntarily run ashore and saved, and one that is run ashore and lost ; and perhaps the ordinance of *Philip II.* to which he and *Voet* refer, may have been thought to have applied the rule of contribution to this latter case, though I cannot read it in that ordinance as given us by *Magens*. The *Prussian* ordinance of *Konigsberg* is the only one which lays down such a rule, and that, like the opinion of *Voet*, is expressed in terms not to be mistaken ; for it says that “if the master, for saving the cargo, and preventing greater damage, shall, after the usual consultation, designedly run the ship ashore, and thereby the cargo is saved, but the ship utterly lost and beaten to pieces, the average contribution shall remain good, and the goods thus saved contribute to the ship.” (*Magens on Insurance*, vol. 2. p. 200.) But notwithstanding the weight which these cases or opinions may justly deserve, I am persuaded that they have arisen from a misapplication of principle, for the general doctrine and language of the marine law is undoubtedly otherwise, and the evidence of this appears in the most authoritative treatises which we have upon the subject. They either expressly assert, or evidently imply, that if the ship be stranded and lost, (no matter by what means,) it is not a case of

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general average, and that such average applies only to the partial damages which the rescued ship sustains by an act done for the common safety. (*Cleirac sur Jugemens d'Oleron*, p. 42. *Le Guidon*, c. 5. art. 28. *Ord. de la Marine*, tit. *Des Avaries*, art. 6. Tit. *Contrib.* art. 15, 16. *Valin*, tom. 2. 168. *Huber's Prælec. ad Pand.* lib. 14. tit. 2. s. 4. *Emerigon*, tom. 1. p. 614. 616. *Roccus de navibus et nauulo*, *not. 60. *Ord. of Rotterdam*, art. 101, and of *Copenhagen*, tit. *Average*, art. 5.) We cannot have recourse to better sources for the principles of the marine law on the subject of contribution; and as far as the *English* writers have alluded to this question, they have adopted the same ideas. (*Malynes*, 110. *Molloy*, b. 2. c. 6. s. 12. *Beawes*, tit. *Salvage*, &c. *Marshall*, 537, 538.) Nothing can be more clear and explicit than the language of *Emerigon*; "the damages (he observes) resulting from the stranding of the ship, if the stranding be done voluntarily, for the common safety, are general average, *provided always, that the ship be again set afloat; for if the stranding be followed by shipwreck, then it is save who can.*" (a)

These authorities are founded on sound principles, for the loss of the ship, in these cases, is more imputable to casualty than design.

When a ship is voluntarily run ashore, it does not, of course, follow, that she is to be lost. The intention is not to destroy the ship, but to place her in less peril, and if she afterwards goes to pieces, or is otherwise lost, it is not to be attributed exclusively to the act of the master, but to the direct, and more immediate operation of other causes. In most cases, he has no expectation, and certainly no intention, of destroying the vessel. He does an act hazardous to the vessel and cargo, in order to escape from a more pressing danger, as a storm, or the pursuit of an enemy, or pirate. The stranding may be an act done for the common safety, but this cannot be said to be the case of the subsequent shipwreck or capture. Indeed, the very act of running a ship ashore is desperate, and places the cargo in extreme jeopardy; and if it happens that the ship be lost, and the cargo saved, it is saved *tanquam ex incendio*, according to the allusion in the *Rhodian* law. In such a case, it is emphatically said to be "save who can;" and to burden the rescued cargo with contribution for the ship, would seem to be oppressive, and is clearly not within the policy and equity of the rule.

The court are, accordingly, of opinion, that there is no contribution in this case, and that the plaintiffs are entitled to recover as for a total loss.

Judgment for the plaintiffs.

(a) The same rule is laid down in the new *Commercial Code of the French Empire*, which has been recently translated by a learned *American* jurist. It is there stated, (art. 425,) with the precision and brevity for which the *French* codes are distinguished, that "the cargo does not contribute for the ship, if she is lost or rendered unfit for sea."

*THE SAME *against* THE SAME.ALBANY,
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THIS was an action on a policy of insurance on the *freight* of the same ship, valued at the sum insured, being 2,500 dollars, and for the same voyage, as stated in the last case; and a verdict was found for the plaintiff, subject to the opinion of the court, on a case containing the same facts.

Colden, for the plaintiffs. The vessel having been totally lost by one of the perils insured against, there must be a total loss of freight. No freight was earned. A *pro rata* freight is due when goods are delivered at an intermediate port of necessity, to the consignee or his agents. Freight was payable on the delivery of the cargo at *Bremen*. It was never the intention of the master to go to *Amsterdam*. He was forced by necessity to go into the *Texel*. It was, therefore, a port of necessity, as much as if *Amsterdam* had not been inserted in the policy. All the facts show, that *Bremen* was the port of destination, and that there was no intention to touch at *Amsterdam*, or deliver any part of the cargo at that place. The twenty-five boxes of *Peruvian* bark, intended for the Messrs. *Willincks*, were landed by order of the government, and the rest of the cargo was seized, on board of the lighters, and detained by the government. The cargo was never delivered at the port of destination, or to the consignee or his agent, at a port of necessity.

It will be said, that the policy contains a clause warranted free from seizure in port. But that clause does not apply to the freight. *The vessel was never seized; but the vessel and freight have been lost by the perils of the sea, against which the insurance was made. If there had been no seizure, yet the master was not bound to carry on the goods in another vessel, but might have abandoned them. And if, after the accident arising from the perils of the sea, he was prevented from carrying the goods, by another peril not insured against, still the insurer is liable.

C. I. Bogert, and *S. Jones, jun.* contra. The whole of the *freight* was earned; for *Amsterdam* may be considered as the port of destination. The *bark* was consigned to the *Willincks*, who obtained a permit for its being landed, and paid the freight. But suppose *Amsterdam* to be a port of necessity, then the plaintiffs were entitled to a *pro rata* freight; (2 *Johns. Rep.* 323;) for the goods were delivered to *Field*, one of the plaintiffs, and who was *consignee* and *supercargo*. The goods were discharged into lighters by the master, under the direction of *Field*; and the moment they were delivered on board the lighters, the freight was earned. The goods were carried up to *Amsterdam* before they were

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The ship having sprung a leak, the master, without any intention of going to Amsterdam, but from necessity, put into the *Texel*, where the ship was repaired, but was detained by an embargo, and ordered to Amsterdam. During this detention, a small part of the cargo, (a quantity of *Peruvian* bark) by order of the govern-

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ment, and against the will of the master, was delivered, and the freight paid. The embargo being taken off, the ship, with the rest of the cargo, returned to the *Texel*, for the purpose of pursuing her voyage to *Bremen*, but was further detained by a general regulation of the government, for four days, at the *Texel*, and while so detained, a violent storm arose, and for greater safety, and with the advice of the

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crew, the cables were cut, and the ship run on shore; in consequence of which, she was so much injured as not to be worth repairing, if got off, which was deemed impracticable.

The cargo having been discharged on board of lighters, was seized and detained by order of the government, and carried to *Amsterdam*, where it was put into the king's stores. The cargo was not consigned to any particular place or person; but

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was to be delivered to the order of the shippers; and both ship and cargo were placed under the direction of the supercargo, (a part owner and one of the insured,) as to the destination of the ship and management of the cargo.

It was held, that to entitle the plaintiffs to freight, there must have been either a delivery of the cargo at *Bremen*, or a voluntary acceptance of it at the *Texel* or *Amsterdam*, by the consignee or supercargo, or a refusal by him, upon an offer

seized. If they had not been seized, they would have been in the hands of the consignee or his agents. If they were prevented, by the seizure, from coming to the possession of the consignee, then it is a loss, for which the defendants, under the clause in this policy, cannot be liable. The clause does not refer to a seizure of *freight*; but it means, that if by reason of a seizure in port, either of the vessel or cargo, the freight should be lost, the insurers are not to be liable. So that, in either point of view, the plaintiffs cannot be entitled to recover. In the case of *Levie v. Janson*, (12 *East*, 647. *Peake's N. P. Cases*, 212,) the vessel was warranted free from *American* condemnation. and was stranded, by the perils of the sea, in going out of the port of *New-York*, and, while ashore, was seized by the officers of the government of the *United States*, for a breach of the embargo; and the Court of King's Bench held, that the *total* loss having ultimately arisen from a peril, *excepted out of the policy*, the insured was not entitled to recover.

D. B. Ogden, in reply. The master swears he intended to go to *Bremen*, and that he went into the *Texel* only from necessity. Indeed, the facts in the case clearly show that *Amsterdam* was a port of necessity. Because some of the goods were consigned to Messrs. *Willincks*, it does not follow that they were to be delivered at *Amsterdam*; for the bill of lading expresses that they were to be delivered at *Bremen*. Besides, the bark only was delivered, and the other articles consigned to the *Willincks*, were directed to be carried to *Bremen*.

To entitle the party to a *pro rata* freight, there must be some benefit conferred on the owner of the goods; there must be a ground for a *quantum meruit*. The moment the goods reached *Amsterdam*, they were seized in the lighters, and never came into the possession of the insured or his assigns.

KENT, Ch. J. delivered the opinion of the court. To have entituled the plaintiffs to freight, there must have been a delivery of the cargo at *Bremen*, or a voluntary acceptance of it, at the *Texel* or *Amsterdam*, by the consignees, or by *Field*, the supercargo, or a refusal by him, upon an offer made, to have the goods sent on in another vessel. Neither of these events happened, except as to a small part of the cargo consigned to the *Willincks*. There is no sufficient evidence in the case of any other delivery or acceptance, nor of any offer by the captain to provide means to forward the goods. The case shows, that the goods were of necessity discharged from the ship into lighters, and that while in that situation they were seized. The freight was, therefore, lost to the plaintiffs. The next inquiry is, by what means it was lost, and whether

if the seizure had not happened, the goods might not have been sent to *Bremen* by another vessel. If this might have been done, the omission to do it arose either from the voluntary neglect of the captain, or from the seizure. The underwriters, by the warranty in the policy, were to be exempt from loss by "seizure in port;" and the point is, whether it be a good defence, in any case, to an action on a policy on freight, that the ship-owner refused, or neglected, to forward the goods by another vessel, when he had it in his power. We have not met with any decided case on this point; but it appears to be reasonable, and consistent with the principles of the contract, that the insurers should, in such case, be discharged. The contract is, for the insurance of the freight of the cargo on board the ship *Dean*, from *New-York* to *Bremen*. It is not of the essence of the contract, that the cargo should, in every event, be conveyed in the ship mentioned, because the party is allowed to change the ship from necessity. The delivery of the cargo is the cause of earning freight. The ship, on board of which the goods are laden, is the vehicle of conveyance agreed on, but it is only one of the means, and not, in all cases, the indispensable means, to attain the object. It is well understood and settled, that when the vessel is disabled *in the course of the voyage, and the cargo remains, the captain is authorized to forward it by another vessel, and thereby to earn the freight. If the shipper, or his agent, will not consent to this, the captain will then be entitled to his full freight, and if he cannot, or will not, forward the goods, the freighter is then entitled to receive them, without paying any thing. (*Griswolds v. New-York Ins. Company*, 3 *Johns. Rep.* 321. 10 *East*, 393.)

If other means to forward the cargo can be procured, it depends entirely upon the captain's volition whether he earns freight or not; and if it be lost by that volition, it ought not to be at the expense of the insurer, who only undertakes to answer for the loss of freight arising from *vis major*, and not from the act, unless it be the barratrous act, of the party. If the disabled ship be easily repairable, the ship-owner is bound to do it, and he cannot, in that case, resort to the insurer for his freight. This was so decided in the case of the *Griswolds v. The New-York Ins. Company*. If it be equally in his power to procure another vessel, and he does not, there is the same reason that he should be precluded from placing the consequences of that neglect upon the insurer.

In the present case, it does not appear that the captain took any step, or made any effort, to forward the goods by another conveyance. If he was prevented by other means than the seizure, it ought to have been shown; otherwise, the omission is justly imputable to that cause. That is the only apparent and proximate, and it was an efficient, cause.

The court are, therefore, of opinion, that the defendants

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made to carry on the goods in another vessel. That if the master or ship-owner neglects to forward the goods by another vessel, when he has it in his power to do so, in consequence of which the freight is lost, the insurer is not liable. That it was incumbent on the insured to show that the master was prevented by some other cause than the seizure of the

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goods, from carrying them to *Bremen*, otherwise the omission to carry them, was imputable to the seizure, as the apparent and proximate cause. (a)

(a) Vide *Schiefelin v. New York Ins. Co.* *infra* 21. *Treadwell v. Union Ins. Co.* 6 *Cowen*, 270. *Center v. American Ins. Co.* 7 *Cowen*, 564. *S. C.* in error 4 *Wendell*, 45. *Marine Insurance Co. v. United Ins. Co.* *infra* 186

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are not answerable for the loss of the freight, and that they are entitled to judgment.

Judgment for the defendants.

***J. & H. SCHIEFFELIN against THE NEW-YORK INSURANCE COMPANY.**

Insurance on goods from New-York to Bremen, with liberty to touch at Amsterdam, Rotterdam, or Tonningen, for a market, "against the dangers of the seas only;" and, "in case of capture or detention, the risk to continue during and after such capture and detention." The ship having sprung a leak, the master, without any intention of going to Amsterdam, but, from necessity, put into the *Texel*, where the ship was repaired, but was detained by an embargo, and ordered to Amsterdam. During this detention, a small part of the cargo, (a quantity of *Perurian* bark,) by order of the government, and against the will of the master, was delivered, and the freight paid. The embargo being taken off, the ship, with the rest of the cargo, returned to the *Texel*, for the purpose of pursuing her voyage to Bre-

THIS was an action on a policy of insurance, dated the 27th of *June*, 1809, on goods, laden on board the same ship *Dean*, for the same voyage as in the last case, with liberty to touch at *Tonningen*, *Amsterdam*, or *Rotterdam*, for a market, if not blockaded. The insurance was declared to be against "the dangers of the seas only;" and in case of capture or detention, the risk to continue during and after such capture or detention." The loss was declared to be by the perils of the sea.

The cause was tried at the *New-York* sittings, on the 25th of *April*, 1811, before Mr. Justice *Thompson*. A verdict was taken for the plaintiffs, subject to the opinion of the court, on a case containing the same facts as are stated in the preceding case of *Bradhurst & Field v. The Columbian Insurance Company*, in the action on the policy on the ship.

Colden, for the plaintiffs. The wreck of the vessel was a total loss by the perils of the sea; and the insured had a right to abandon, which could not be taken away by any subsequent event. A total loss is either a loss of the subject or the voyage. A stranding, followed by shipwreck, is a total loss of all the subjects. (2 *Emerigon*, 180. 187. *Marshall on Ins.* 483. *Pothier*, n. 120.) In *Manning v. Newnham*, (*Park*, 221,) Lord *Mansfield* said the ship had received an irreparable hurt; the goods could not be carried on, and the voyage was totally lost.

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ing this detention, a small part of the cargo, (a quantity of *Perurian* bark,) by order of the government, and against the will of the master, was delivered, and the freight paid. The embargo being taken off, the ship, with the rest of the cargo, returned to the *Texel*, for the purpose of pursuing her voyage to Bre-

*As it regards the ship-owner, or master, he is bound, by his contract, to carry on the goods; but, in regard to the insured, or owner of the goods, he is not responsible for the neglect or misconduct of the master. The owner of the goods does not undertake for his good conduct. There is no contract between the insurers and the insured, by which the latter can be liable for the misconduct of the master; but, after the shipwreck or peril has happened, the insurer becomes responsible for all the consequences; and if the master fail in his duty to the ship-owner, it is *barratry*. Any unlawful act, though not fraudulent, and though done for the benefit of the owner, is *barratry*. The insurer cannot, when a loss has happened by a peril against which he was insured, set up another, as *barratry*, to prevent a recovery. (*Gardere v. Col. Ins. Co.* 7 *Johns. Rep.* 514.)

Again, admitting it to be the duty of the master, after the

ship becomes incapacitated to pursue her voyage, to find another vessel, and carry on the goods to their port of destination; yet the goods must be in such a situation that they can be carried on. But, in this case, the goods, on going into the *Texel*, were immediately detained by the embargo, and were afterwards seized in the lighters, so that they could not be carried to the port of destination.

It will, perhaps, be said, that the loss was owing not to the stranding, and consequent shipwreck, but to the seizure on board the lighters, as the proximate cause of loss; and the case of *Levie v. Janson* (12 *East*, 647) will be relied on for this doctrine. But that case, recently decided in *England*, is not an authority; nor is it, for any reason contained in the case, entitled to the weight of an authority. Lord *Ellenborough*, in giving his opinion, proceeds on the ground of mere *sea-damage*, or deterioration by the first accident, which would not, of itself, give a right to abandon for a total loss; but there was, in fact, a *shipwreck*. The vessel was rendered, by the stranding, completely innavigable. No doubt, where an accident happens, which merely retards the vessel in her voyage, and she afterwards proceeds and is captured, the last event is to be alone regarded as the cause of loss. In the case of *Green v. Elmslie*, (*Peake's Cases*, 212,) on which his lordship relies, the vessel was not lost, nor even damaged by running ashore, and the only cause of loss was the capture.

Now, in the present case, such a loss happened by the perils of the sea, as would be a sufficient ground of abandonment, prior to the seizure of the goods in the lighter. The peril had happened against which the insurance was made, and the defendants cannot *avail themselves of the subsequent events to resist the claim of the plaintiffs.

Again, did the goods arrive at their port of destination, or were they delivered to the consignees, or the insured? The master swears, positively, that he never intended to deliver any part of the cargo at *Amsterdam*; and that he never did deliver it to the consignees. The mere circumstance of the consignee of some of the goods being at *Amsterdam*, does not vary the case, when, by the terms of the bill of lading, they were to be delivered at *Bremen*. The endorsement made by Messrs. *Willincks* on the bill of lading, that they had received the bark, but ordering the other merchandise to be delivered at *Bremen*, shows conclusively that *Bremen* was the port of destination. There was no delivery to Mr. *Field*, the supercargo, for the goods were detained by the government, as soon as they were put on board of the lighters, and were seized before they touched *Amsterdam*. There is no direct evidence of any delivery to the supercargo, or that he was on board when the goods were put into lighters, though it has been so inferred, from the fact that the cargo was placed under the direction of *Field*, as supercargo.

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men, but was further detained, by a general regulation of the government, for four days at the *Texel*, and, while so detained, a violent storm arose, and for greater safety, and with the advice of the crew, the cables were cut, and the ship run on shore, in consequence of which she was so much injured, as not to be worth repairing, if got off, which was deemed impracticable.

The cargo having been discharged on board of lighters, was seized and detained by order of the

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government, and carried to *Amsterdam*, where it was put into the king's stores. The cargo was not consigned to any particular place or person, but was to be delivered to the order of the shippers; and both ship and cargo were placed under the direction of the supercargo, (a part owner and one of the insured,) as to the destination of the ship and management of the cargo. It was held, that there was no

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acceptance of the cargo at Amsterdam or the Texel, by the supercargo or agent of the shippers; and that the loss of the voyage was occasioned by the seizure, which prevented the cargo from being sent on to its port of destination, in another vessel; the presumption being, from the circumstances of the case, and no evidence to the contrary being shown by the plaintiff,
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that had it not been for the seizure, another vessel might have been procured to carry on the cargo to Bremen.

It is the duty of the master, when the ship becomes disabled, during the voyage, to procure another vessel, if it is in his power; and the insurer is not answerable for the consequence of his voluntary neglect to do so, unless such neglect is caused by an act of *barratry*. And it is a general rule, that the plaintiff, in an action on the policy, in order to entitle himself to recover, on the ground of the loss of the voyage, must show that

Hoffman and T. A. Emmet, contra. The only question in the case is, whether there has been a loss by the *perils of the sea*. The goods were not damaged, and if there is a total loss, it can be only by the operation of the perils of the sea, not directly on the goods, but on the voyage, so as to prevent their arrival at the port of destination. *Stranding*, though followed by shipwreck, does not, in all cases, produce a loss of the cargo. The goods may be saved, though the vessel is lost. In *Levie v. Janson*, though the vessel was stranded, and it took six weeks to get her off, it was not pretended that there was a total loss by the perils of the sea. The loss in this case is averred to be by the perils of the sea; but the injury was to the ship, not to the cargo. The loss of one subject cannot, of itself, be considered as the loss of another distinct subject, unless such be the immediate and direct consequence of the injury to the first subject. (*Goolds v. Shaw*, 1 *Johns. Cases*, 296.) The mere destination of the vessel does not defeat the voyage, as it respects the cargo, unless it is also shown that the goods could not be sent, in any other vessel, to their place of destination. Now, if we look at the *map of Holland*, it will be seen that the very lighters in which the goods were put, might have passed by the *Zuyder Zee* to *Bremen*, or from the *Texel*, through the *Diep Zee*, between the islands and the shore, which is a usual and safer route than by the open sea. It was as easy to go to *Bremen* as to *Amsterdam*. But it is said that the cargo could not be sent in another vessel, because it was seized by the government, on board the lighters; but the defendants are not answerable for any loss arising from seizure or detention, except for perils of the sea happening during a detention.

It may be made a question whether the master, after the loss of the vessel in which the goods were shipped, is bound to send them to their place of destination, by another vessel, if one can be obtained. It is a contract for the carriage of the goods from one place to another. The transportation is the principal thing, and the vessel or mode of conveyance is incidental. It is agreed, that the master has the right to hire another vessel and carry on the goods, so as to entitle him to full freight; and it has been said that a master has no authority to sell the cargo at an intermediate port, in any case whatever. (10 *East*, 143. 378. *Hunter v. Princep*.) If the point is not clearly and positively settled, on principle, it ought to be decided, that what the master may do, he ought to do; and that it is his duty to find another vessel, if possible, by which to carry the goods to their place of destination. If, then, it is the duty of the master, under his contract, to hire another vessel, and carry on the goods, and he does not, and the voyage is, therefore, broken up, it is the fault of the master, for which the insurers are not liable. There cannot be an act of *barra-*

try, without fraud, except in the particular case of *smuggling*, or some act in violation of the laws of the country.

Again, the goods had no particular destination, but were subject to the direction of the supercargo. *Field* returned on board the ship on the 15th of *August*, and the goods were discharged into lighters on the 21st; and it is a necessary inference that he was present, and gave directions relative to the cargo intrusted to his management. If the goods could not have been sent to *Bremen*, they might have been left at the *Helder*; but the supercargo elected to send them to *Amsterdam*, and he thereby made that the place of destination or delivery. The cargo was thus accepted by the consignee; for, though detained by the embargo, it was not seized, but sent to *Amsterdam*, in an opposite direction from the regular course of the voyage to *Bremen*; and at the quay at *Amsterdam* the goods were seized and put into the king's stores. If the goods did not reach *Bremen*, it was not because there was no vessel by which they could be carried, but because they were detained by the government. Then, we say, there has been no loss by the perils of the sea, or within the policy.

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another vessel
could not be
obtained. See
*Bradhurst &
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9—16.

**D. B. Ogden*, in reply. According to the evidence in the case, and after all that has been said, there cannot remain a doubt that *Bremen* was the port of destination. As to the passage pointed out, from the *Texel* to *Bremen*, it does not appear that it was a safe or proper course. It abounds with islands or shoals, and is extremely dangerous.

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The captain speaks of the goods, while in lighters, being detained in the *Texel* by *the embargo*; but he must have meant that they were seized by the government, for he had before stated that the embargo was taken off, and the vessel permitted to proceed on her voyage; and he was detained at the *Texel* only by a particular order, and for a particular purpose. The fact, then, was, that the goods were seized, as soon as they were on board of the lighters, and sent up to *Amsterdam*, and there put into the king's stores; but in whatever way the goods were sent to *Amsterdam*, they never came to the hands of the consignees.

Again, it is said that the defendants are not answerable, because the cargo might have been sent in another vessel, or in the lighters to *Bremen*. As soon as the technical total loss happened by the perils of the sea, the plaintiffs had a right to abandon and recover, unless the defendants can show, affirmatively, that the goods might have been transported in another vessel. That is ground of defence for them. The *onus probandi*, as to that fact, lies on them, not on us. They must show that the lighters were sufficient to transport the goods, or that other vessels might be obtained. A stranding, followed by shipwreck, is a technical total loss, because it breaks up the voyage.

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In the case of *Goold v. Shaw*, the insurance was on the ship, which was repaired, and performed the voyage, and the only point decided was, that the underwriter on the ship should not be answerable for the nature of the cargo, which might render a sale necessary at an intermediate port. In *Green v. Elmslie*, the vessel had received no damage from sea risk, but had been driven on the enemy's coast; and the court said that had she been driven on any other coast she would have been in perfect safety. And in *Levie v. Janson*, Lord *Ellenborough* goes on the ground of a partial loss. The stranding, in that case, was not followed by *shipwreck*; for the vessel was got off. These cases do not, therefore, apply to the one now before the court. A shipwreck is where a vessel is so injured as to be rendered innavigable, or incapable of proceeding on her voyage, or where the expense of repairs would exceed half her value. It is not necessary that the loss should be the immediate and direct consequence of the accident. *It is enough, if it can be fairly attributed to the peril which has happened. (*Jones v. Schmoll*, 1 Term Rep. 130, in note.)

The stranding and shipwreck produced a technical total loss; and had the parties been on the spot, the plaintiffs might have immediately abandoned. What was done, afterwards, was done for the defendants, by persons acting for their benefit.

KENT, Ch. J. delivered the opinion of the court. There is no proof, in this case, that the goods were damaged to the amount of a moiety of their value, or to any considerable extent, by the stranding and loss of the ship. If the claim for a total loss can be supported, it must be on account of the loss of the voyage. The evidence does not warrant any suggestion that there was an acceptance of the cargo by *Field*, as the authorized agent of the shippers. But it has been strongly contended, that the loss was to be imputed to the seizure by the *Dutch* government; and if this was so, the defendants are not responsible, inasmuch as the insurance was against "the dangers of the seas only." There are two points of view in which the seizure may be considered as the cause of the loss; 1. As being the proximate and efficient cause which absorbs all inquiry into the previous loss by the stranding of the ship; and, 2. As destroying the power, otherwise existing, of the captain to forward the goods by another vessel. The counsel upon the argument, dwelt principally upon the former mode in which the seizure operated; but I think the loss is rather to be imputed to the seizure, in the last point of view. The seizure would seem not to affect the case, if the loss was total prior to its taking place. An abandonment, when founded upon a statement of facts justifying it, relates back to the time of the loss, and renders the insurer proprietor of the subject from that time, with the rights and risks attached to that relation. (2 *Emerigon*, 196. 235.) If a loss ceases to be total,

when the abandonment is actually made, as in the case of a capture and subsequent restoration, the rights of the parties will be determined by the state of things existing at the time of abandonment. But the previous loss of the voyage in this case, if such a loss had actually happened, did not the less continue to exist after the seizure.

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In cases of partial loss, followed by a subsequent total loss, the former may properly be considered as merged in the latter, and the authorities which were cited to this point, of *Green v. Elmslie*, (*Peake's Cases*, 212,) and *Levie v. Janson*, (12 *East*, 648,) were cases of that description. But these cases do not apply when the *first loss is, in judgment of law, total. If a succession of perils ensue, and the first, in the order of time, produces only a partial injury, every one must concur in the good sense of the observation of Lord *Ellenborough*, that "we are not to be seeking about for odds and ends of previous partial losses, when, at last, there was an overwhelming cause of loss which swallowed up the whole subject matter." But suppose the policy was against capture only, and the vessel was captured and then shipwrecked, while in the hands of the captor, I should think the assured would have a right to abandon, and to maintain that his right to recover, as for a total loss, attached upon the capture, and that the subsequent casualty was one with which he had no concern. When the first loss is distinct, and so far total as to justify an abandonment, which is accordingly made, and there is no after recovery to defeat it, the rights of the parties are fixed, and we are not to be casting our eyes forward to see what further perils awaited the property. Those inquiries belong to the insurer, in whom the residuary interest has vested.

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The case is then brought to this point; was here a loss of voyage, by the loss of the vessel, so as to authorize the demand for a total loss? There undoubtedly was, if we lay out of view the seizure, and admit that the goods could not have been forwarded by any other vessel. But the master ought to have provided other means to send on the cargo, if he had it in his power; and if he can and will not, it would seem to be the better opinion that the insurer is discharged.

In *Manning v. Newnham*, (*Park*, 221, 6th edit. 2 *Campbell*, 624, note, S. C.) there was an insurance on ship, cargo and freight, and after the voyage was commenced, the ship was so disabled by the perils of the sea, that she put back in distress, and could not proceed nor be repaired, nor could any other vessel be procured to take on the cargo. The assured, therefore, recovered for a total loss, by reason of the loss of the voyage. Lord *Mansfield*, in giving the opinion of the court, laid stress upon the fact, that there was no other ship to be had, and his opinion evidently implies, that if another vessel could have been procured, it would have been the duty of the master to have forwarded the cargo, and the assured would

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not have been entitled to recover a total loss upon it. If the captain has other means to forward the cargo, and save the voyage, and earn the freight, he ought to do it. What *may* be done, *ought* to be done, when the rights of third persons are essentially concerned in the act. The *master is bound to act for the best interest of all concerned. He is the agent of the assured until an actual and valid abandonment, and they ought to bear the consequences of his neglect if the voyage be thereby lost, unless barratry be the cause of that neglect. The late case of *Wilson v. The Royal Exchange Assurance Company*, (2 *Campbell's N. P.* 623,) which was tried before Lord *Ellenborough*, is a direct authority on this point. That was an insurance upon a cargo of wheat from *London* to *Lisbon*, and the ship was disabled after the voyage had begun, and could not be repaired, without an expense much greater than her entire value. The demand was for a total loss, on account of the loss of the voyage; but as it appeared that there was another vessel lying at *Dover*, where the injured ship lay, in which the cargo might have been forwarded, his lordship held that the plaintiff could not recover.

It may be a question whether it belongs to the plaintiffs, in such cases, to show that another vessel could not be had. The circumstances of each case may, perhaps, be sufficient to turn the presumption on the one side or the other; but, as a general rule, it belongs to the plaintiff to make out a complete case, and his case is not complete, unless it appear that the voyage was lost by a peril within the policy. It is not lost, as to the ship, if he has the means to repair her; nor as to the cargo and freight, if he has the means in his power to send on the one, and to earn the other. But in this case, as the cargo lay in the midst of vessels, at the *Texel*, or was in the neighborhood of *Amsterdam*, and as the seizure formed at once an insuperable obstacle, the omission to forward the cargo must be imputed to the seizure. Nothing short of proof of diligent inquiry, and fruitless exertions to procure means, could rebut this presumption. When one sufficient cause for the omission appears affirmatively, we are not to be searching for latent ones.

The small partial damage which the cargo sustained by sea perils previous to the seizure, is not to be regarded; for here the doctrine in *Levie v. Janson* properly applies. There was no total loss of any distinct portion of the cargo. "Fifty hogsheads of sugar were found to be damaged by sea water, and part of the sugar had dissolved and run out, and a part of the drugs was also damaged." But the extent of the damage is not stated, and cannot now be ascertained. It may have been one or more entire hogsheads, or only a small proportion of the contents of each. The subsequent total loss by seizure has closed these inquiries.

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*The court are, accordingly, of opinion, that the voyage was

lost by the seizure preventing the captain from sending on the cargo, and that the defendants are entitled to judgment.

Judgment for the defendants.

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FONTAINE
v.
COL. INS. CO.

FONTAINE *against* THE COLUMBIAN INSURANCE COMPANY.

THIS was an action on a policy of insurance on the cargo of the ship *Concord*, at and from *Guadaloupe* to *New-York*. The defendants paid into court 1,060 dollars under the common rule.

The cause was tried before the *Chief Justice*, at the *New-York* sittings, in *December*, 1810, when a verdict was taken for the plaintiff for 1,500 dollars, subject to the opinion of the court, on the following case :

On her voyage, the ship was captured by a *British* cruiser, and sent into *Antigua*, on the 14th of *October*, 1808, where she was libelled in the vice-admiralty court. A claim was put in by the master, and part of the cargo was released, but the residue, part of which belonged to the plaintiff and another person, was detained for further proof, to be produced in three months, with leave to the plaintiff to take the property, on giving security for the appraised value, and paying the costs. He procured *Hall & Rose*, merchants at *Antigua*, to become security ; and on their giving the security and paying the costs and charges, the property was delivered to the master, on the twenty-eighth of *October*.

Pursuant to his agreement with *Hall & Rose*, the master drew two bills of exchange in their favor, on the owners of the ship in *New-York*, one of which was for the appraised value of the part *of the cargo detained for further proof, and the other for 1,982 dollars and 23 cents, the amount of the disbursements of *Hall & Rose*, for the vessel and cargo, and for the costs of the claim in the court of admiralty, including a commission of *five per cent.* as a compensation for their services, performed at the master's request, and including a premium for an insurance effected by *Hall & Rose*, on the ship and cargo to *New-York* ; the master having, by an instrument of *bottomry* and *hypothecation*, pledged the ship and cargo to them, as security for the payment of the bills of exchange. The ship and cargo arrived safe at *New-York*, and the security given at *Antigua* was afterwards released, on the production of further proof. The property of the plaintiff was delivered to the agent of *Hall & Rose*, in *New-York*, who held it until he was paid the sum of 1,291 dollars and 43 cents, being the plaintiff's proportion of the particular and general average, as calculated by an insurance broker. The plaintiff paid that sum to the agent of *Hall & Rose*, and received his property.

Insurance on goods from *Guadaloupe* to *New-York*. The vessel was captured by a *British* cruiser and carried into *Antigua*, and libelled in the admiralty court there. The master put in a claim, and the goods were detained for further proof, but were delivered to the master on his giving security for their appraised value and paying the costs. The master procured *A.* a merchant in *Antigua*, to give the security, and also to pay the costs and other expenses for the ship and cargo.

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go ; and for the indemnity of *A.* the master drew bills of exchange on his owner in *New-York*, and pledged the ship and goods to *A.* to secure the amount, which included a commission of 5 per cent. charged by *A.* on the sums advanced by him, and a premium of insurance paid by him to insure the ship and cargo, so pledged, from *Antigua* to *New-York*.

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The cargo was delivered to the agent of A. in New-York, and the insured, to obtain the possession of his property, paid his proportion of the charges and expenses, including the commissions and premium of insurance. It was held, that the master having acted with good faith, and the charges being reasonable and necessary, the insured were entitled to recover the amount so paid, against the insurers. In case

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of necessity, the master may sell a part, or hypothecate the whole, of the cargo, for the necessary repairs of the ship; but he cannot mortgage or hypothecate the ship for the benefit of the cargo.

The present suit was brought to recover of the defendants the amount so paid, with interest.

The only question was, whether the defendants were answerable for the plaintiff's proportion of expenses, so far as respected the *items* charged by *Hall & Rose*, for their *commissions*, and the *premium* of insurance.

Colden, for the plaintiff.

C. I. Bogert & S. Jones, jun. contra.

Per Curiam. There was nothing unreasonable, and, probably, nothing unusual, in these charges of *Hall & Rose*. It was not to be expected or required, that a mercantile house abroad should make advances and become security, without some compensation, and without being completely protected against loss. The *five per cent.* was their compensation, and the mortgage of the property to them, and the insurance of it, when they parted with the possession, was their indemnity from loss. The security, by means of the mortgage, would have been greatly weakened, and put at hazard, if the property had not been insured. The insurance was necessary to render the mortgage effectual. There is no reason to suppose that the captain did not act with good faith, and with due discretion, in reclaiming the property. No better terms could have been obtained; it was the duty of the captain to *accept of those terms, and not to leave the property behind. The plaintiff's cargo was mortgaged to *Hall & Rose*, in consideration of their becoming security to answer for its value, and there is no reason to doubt of the power of the master to mortgage it. The principles of the maritime law clothe him with the power of agent of the cargo when cases of extremity occur. He may sell a part, or he may hypothecate the whole cargo, even for the necessary repairs of the ship, when that act is required to enable him to continue the voyage. Though, ordinarily, he is the mere carrier of the cargo, yet in a case of difficulty and peril, he becomes, *ex necessitate*, a trustee of it, with a large and liberal discretion, and this character is then given to him from public policy, for without this power the cargo might be left to perish. (*The Gratitude*, 3 Rob. Adm. 240.) If the master has this power over the cargo for repairs to the ship, it exists, in at least equal force, when the interest of the cargo is directly in question; and this case contains intrinsic evidence, that the terms on which the assistance of *Hall & Rose* was procured, were as favorable as any that could have been obtained. The plaintiffs had no agent or consignee at *Antigua*, for none appears, or is to be presumed. It was an island to which the ship was carried by the captors. To whom was the captain to apply for aid? If *Hall & Rose* had exacted exorbitant compensation or security, the presump-

tion would have been different, and it might have been incumbent on the plaintiff to have shown that other applications for security had been made, and failed. The indemnity required by *Hall & Rose* of a mortgage of the cargo released, was reasonable for them to ask, and within the power of the captain to give; and having taken it, the insurance was necessary to render the security perfect, and the premium for the insurance was no more than a necessary charge attending the taking of the security.

But the captain went further and mortgaged the ship, and so far he acted without authority; for to mortgage the ship for the benefit of the cargo, seems to be going beyond his trust, or the rules of law. Admitting, however, that the hypothecation of the ship was void, still it was exacted, and the premium of insurance for both ship and cargo was included in the bill of exchange, for which the plaintiff's cargo stood pledged. The payment of that premium became a necessary expenditure in the recovery of the plaintiff's property. The question on the validity of the hypothecation of the ship does not, then, arise in this case. The plaintiff was bound to pay his proportion of that premium. *It was one of the *conditions* on which their property was recovered, and the difference between a premium of insurance upon the cargo only, and upon the ship and cargo, could not be so material as to affect the good faith of the master, and the necessity of acceding to the terms upon which *Hall & Rose* offered their assistance.

There ought, therefore, to be no deduction from the plaintiff's claim, on account of either of the above *items* of commissions or premium.

Judgment for the plaintiff.

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ANDREWS & BOERUM *against* THE MARINE INSURANCE COMPANY. •

THIS was an action on a policy of insurance, on the schooner *Maria*, from *Charleston, S. C.* to *New-York*, on account of the plaintiffs, and *M. & A. Clark*, the latter being also master of the vessel.

The cause was tried at the *New-York* sittings, in *June*, 1811, before Mr. Justice *Thompson*; and a verdict taken for the plaintiffs, subject to the opinion of the court, on the following case.

The vessel sailed on the voyage insured, the 18th of *March*, 1811, with a cargo of cotton and rice; and on *Monday*, the twenty-sixth of *March*, at 2 A. M. was lost on *Little Egg Harbor Beach*, about ninety miles from the city of *New-York*. The insurance was effected on the ninth of *April* following, by the plaintiffs.

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A vessel insured from *Charleston* to *New-York*, was, during the voyage, stranded and lost on *Little Egg Harbor Beach*, on *Monday*, the 26th of *March*, at 2 A. M. about 90 miles from *New-York*. The insurance was effected by *A.* and *B.* part owners, for themselves and the other own-

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ers, of which the master was one, on the 9th of April following; but A. and B. knew nothing of the loss until after the insurance. The master was so much hurt, at the time of stranding, as not to be able to attend to business for two or three days; but he made immediate inquiry after the means of communicating information of the loss to New-York, and found that the only conveyance, by land, was the mail, from a place 10 miles distant from the wreck, and which went only once a week, and had previously left the place on the evening of the 26th, and would not leave it again until the Monday following. Several vessels lay near the place of the wreck bound to New-York, but were detained by head winds. With a fair wind, a vessel would arrive at New-York in one day. The master having put the cargo which had been saved, on board

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of three small vessels, embarked in one

It was not pretended, that the plaintiffs had any knowledge of the loss of the vessel, at the time the insurance was made; and the only question was, whether *A. Clark*, the master and part owner, had been guilty of such *gross negligence*, in not communicating *intelligence of the loss to the other part owners as would vacate the policy.

When the vessel went ashore, the master was knocked down by the *tiller*, and so much injured that he was carried to a place called *Hawkins*, eight miles distant from the wreck, and was there for several days disabled. The witness, one of the seamen, did not know of any opportunity to *New York*; but there were several vessels, at the time, at *Little Egg Harbor*, ready to sail, but were prevented from sailing; and none did sail, until the one in which he came up to *New-York*, which arrived there on the 11th of *April*.

On the morning of the shipwreck, the master inquired of an inhabitant of the place, whether there was any post-office in the vicinity, and expressed great anxiety to write to *New-York*; and he was informed that the nearest post-office was at *Tinkerton*, ten miles distant, but that the post left that place only once a week, on *Monday* morning; and that it was then too late for that post day, as the mail had already left *Tinkerton* for *New-York*.

On *Tuesday* the captain went to a place about two miles distant, in a carriage, to make a protest; and on *Wednesday*, he went to the wreck. A person might have been easily hired to carry a letter to the post-office at *Tinkerton*. The post went by the way of *Philadelphia*, where it arrived on *Wednesday* in each week, and could not reach *New-York* before the next day; but a vessel leaving *Little Egg Harbor*, with a wind tolerably fair, would reach *New-York* in one day. On *Saturday*, the thirty-first of *March*, the captain put all the cargo saved on board of three small vessels, embarked in one of them for *New-York*, and, having proceeded about ten miles, they were obliged to anchor, on account of head winds; and, while so detained, the captain might have forwarded a letter to *New-York*, from the place opposite the vessel. On account of contrary winds, he did not arrive at *New-York* until the eleventh of *April*.

A master of a coasting vessel testified that he was at the wreck the day after the vessel went ashore, and inquired of Captain *Clark* if he had any freight for *New-York*; and he told the witness, that he had already engaged vessels to carry the cargo to *New-York*. The witness mentioned that his was a fast sailing vessel, and would reach *New-York* first. She lay out of the mouth of the harbor, and sailed the second, and arrived at *New-York* on the fifth of *April*; but the witness said that he did not *mention the loss of the *Maria* to any person, though it was talked of among the crew on board of his vessel.

In the *New-York Gazette*, published on the twenty-ninth of *March*, the arrival of the schooner *Emily*, in fifteen days from *Charleston*, was mentioned; and, among the occurrences of the voyage, it was stated, that on *Wednesday* preceding they saw a schooner on shore, with yellow sides, on *Little Egg Harbor Beach*, with cotton floating around her.

D. B. Ogden, for the plaintiffs.

Colden and Sampson, contra.

Per Curiam. There is no trace of actual fraud in this case; and it is a question of constructive fraud merely, on the ground that Captain *Clark* did not use due diligence in communicating intelligence of the loss to his partners in *New-York*. It does not appear that Captain *Clark* had directed insurance, or was apprized of any intention of the plaintiffs, to cause insurance to be made. As we cannot, therefore, perceive any interested motive in him to withhold the intelligence, the case did not seem to require that extreme diligence that would have been due, had he known that application for insurance was pending. We ought, then, to exact from him, as part owner, that ordinary diligence only which the nature of such mercantile concerns, and common prudence and discretion would demand. Any thing like gross negligence, in communicating with his partners in such a crisis, would look like design, and justify the inference of fraud: but the circumstances of the case are proof of ordinary diligence. The captain was much injured by the stranding of the vessel, and was, for some time, disabled from bestowing attention to his business. He, however, made instant and anxious inquiries about the means of communicating with *New-York*, by the mail, and was informed that no opportunity would occur, through the next post-office, which was ten miles off, under a week from that time. He had then good reason to believe he would himself arrive in *New-York*, with the cargo saved, before a letter would reach *New-York* by the mail. He had laden his cargo on board of other vessels, by *Saturday* next after the shipwreck, and embarked for *New-York*, and a fair wind would have carried him there in one day. He advanced about ten miles the same day, and was then detained by contrary winds, so as not to be able to arrive in *New-York* in eleven or twelve days.

*Under these circumstances, there is no ground to charge him with a want of ordinary diligence, and the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

(a) See *Watson v. Delafeld*, 2 Calnes, 224. 1 Johns. Rep. 150. 2 Johns. Rep. 526. Where an insurance was effected after a loss had happened, though the master had delayed to convey information of it to the owner, and even taken measures to prevent its being known to him, with the avowed intention of enabling him to make insurance, and the parties were actually ignorant of it. When the policy was underwritten, it was held that the assured having acted with good faith might recover. *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 403.

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of them, on *Saturday*, the 31st of *March*, but, on account of contrary winds, did not arrive until the 11th of *April*.

It was held that there was no actual fraud, and that the master, not knowing of any intention to effect an insurance, was bound to use no more than ordinary diligence; and that under the circumstances, there was not such gross negligence, or constructive fraud, as would vacate the policy. (a)

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SUFFERN

v.

TOWNSEND.

A. & J. SUFFERN against TOWNSEND.

An agreement, for the purchase of land, does not, of itself, amount to a license to the party agreeing to purchase, to enter on the land; and a license to enter does not imply a permission to cut and consume the timber. And where a person, after a parol agreement for the purchase of land, entered and cut timber, and the agreement was afterwards rescinded by him; it was held that he was liable as a trespasser. (a)

This was an action of trespass *quare clausum fregit*, and for cutting and carrying away trees, &c. Plea, not guilty, with notice that the defendant would give in evidence, at the trial, a license to cut and carry away the timber and trees, &c.

The cause was tried, at the *Orange* circuit, on the 12th of *September*, 1811. The plaintiff having proved the entering, and cutting, and carrying away the trees, &c., the defendant offered to give in evidence, in bar of the plaintiff's action, that at the time of the trespass complained of, he was in possession of the *locus in quo*, by virtue of a *parol* agreement, for the purchase of the lot, on which the trespass was alleged to be committed. That this agreement was made in the autumn of 1809, immediately after which the defendant entered, as owner, and the plaintiff showed the lines and bounds of the lot. A deed was to be executed in the following spring. In *March*, 1810, when the lot was surveyed, the defendant, finding that it did not include all the land he supposed, abandoned the lot, and informed the plaintiff that he would not take it on account of the misrepresentation as to the bounds. The plaintiff, accordingly, sold it to another person in *May*, 1811. The alleged trespass was committed while the defendant was so in possession of the lot.

This evidence was objected to, as not constituting a bar to the plaintiff's action, and was overruled by the judge, and the jury, under his direction, found a verdict for the plaintiffs.

A motion was made to set aside the verdict, and for a new trial.

Fisk, for the defendant, contended, that the evidence offered at the trial ought to have been received. Though the *parol* agreement was void as to the purchase, under the statute of frauds, yet it was good evidence of a license to enter. A license need not be in writing. A license to enter is a good plea in bar to an action of *trespass *quare clausum fregit*. He cited 5 *Comyns' Dig.* 791. 2 *Term Rep.* 166. 6 *Johns. Rep.* 46. 7 *Johns. Rep.* 1.

J. Duer, contra, insisted, that a *parol* agreement for a purchase did not imply a license to enter on the land. Suppose even an agreement for a purchase in writing, yet if it does not contain an express permission to enter, it will not give such license, by implication. Again, if the plaintiff had expressly consented to let the defendant enter, on condition that he would become a purchaser, yet if the defendant, afterwards, refused to purchase, he would, by breach of the condition, become a trespasser *ab initio*.

(a) *Acc. Cooper v. Stower, infra*, 331. *Erwin v. Olmsted*, 7 *Conn.* 229.

Per Curiam. The defence set up as a bar to the action was properly overruled. The agreement to purchase and convey did not of itself, amount to a license to enter. It was a mere executory agreement. And even if a license to enter had been shown, it would not have been sufficient, without showing a further license to cut and consume the timber. The one license does by no means imply the other. The defendant could not have pretended to have been in possession, in any higher character than a tenant at will, as the agreement for the purchase of the premises was by parol, and if a tenant at will cuts timber, it is trespass. The matter offered as a defence was altogether insufficient.

Motion denied.

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HURTIN
v.
HOPKINS.

HURTIN *against* HOPKINS.

THIS was an action for a libel, published in the *Orange County Gazette*. The publication was in the form of a letter addressed to Col. G. D. Wickham, as follows: "You may consider it presumption in a citizen, in the common walks of life, to assume to himself the right of investigating the interest and zeal you manifested in procuring the appointment of John G. Hurtin, (the plaintiff,) to the office of sheriff of the county of Orange, to the exclusion of a great number of gentlemen of respectability, as well for character as talents, belonging to the federal party in this county. Your ambition for the exclusive control of the appointment of a high sheriff, you have honestly inherited. The advantages resulting *from that influence, you will ever enjoy over that contemptible apostate, (meaning, &c.) whose ignorance and insolence will make him a fit instrument for all your purposes. (Meaning, &c.) And when you lack the talents and ingenuity to give him a proper direction, you have an arch old gentleman, at your elbow, to direct you both in the arts of juggling." (Meaning, &c.)

In an action for a libel, where the jury find a verdict for the defendant, the court will not grant a new trial, merely because the jury misunderstood or disregarded the evidence. (a)

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The publication by the defendant was proved; and the counsel for the defendant offered to prove the truth of the charges contained in the libel; and no objection being made, several witnesses were admitted for that purpose.

The judge charged the jury that the publication was libelous; and that the defendant having wholly failed in his justification, the plaintiff was entitled to a verdict. The jury found a verdict for the defendant.

A motion was made to set aside the verdict, and for a new trial.

J. Duer, for the plaintiff.

Fisk, contra. He cited 1 Burr. 11. 54. 2 Salk. 644. 2 Burr. 644. 3 Johns. Rep. 180.

(a) In slander, in penal actions, actions for a libel, and other actions vindictive in their nature, a new trial will not be granted merely because the verdict is against the weight of evidence. *Paddock v. Salisbury*, 2 Cowen, 811. *Ex parte Bailey*, 2 Cowen, 479.

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Per Curiam. The general rule is not to grant a new trial, in actions of this nature, when the verdict is for the defendant, and there is no other ground for the motion than that the jury have misunderstood or disregarded the evidence. This was the doctrine of the court in *Jarvis v. Hatheway*. (3 *Johns. Rep.* 180.) In penal actions, the rule has been established by a series of cases; (*Str.* 899. 1238. 3 *Wils.* 59. 10 *East*, 268;) and though actions for defamation, and for malicious prosecution, are not actions for penalties, yet they are penal in their nature; and, in respect to the doctrine of new trials, seem to be governed by the same rules. (2 *Burr.* 664. *Cowp.* 37. *Salk.* 644.) The case before us was not that of a very aggravated libel, nor were the cases in general of that character to which the rule has been applied. A jury would rarely, in a gross case of defamation, find a verdict against the plaintiff; if they did, it would be pretty good evidence of prejudice, partiality or corruption. The court do not mean to lay down a rule for such extreme cases, but they certainly would not be justified by the precedents, to interfere in the present case.

Motion denied.

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*DE LONG against STANTON.

Where a submission was general of all actions, causes of actions, suits, &c. it was held that *parol* evidence was inadmissible to show that the arbitrators awarded concerning a matter which was not in controversy between the parties, at the time of the submission. Arbitrators are to decide *secundum allegata et probata*, and their decision on the matter is final. (a)

THIS was an action of *covenant*, on a bond conditioned for the performance of an award. The cause was tried at the *Orange* circuit, in *September*, 1811.

The declaration stated that certain controversies, disputes and differences, having arisen, and being depending between the plaintiff and defendant, on a certain day, in the said declaration mentioned, the said plaintiff and defendant mutually entered into bonds of arbitration, which were respectively conditioned "to stand to, abide, perform, &c., the award, order, &c., of *David Ayres* and *Thomas Evertson*, of the town of *Deer Park*, in the county of *Orange*, arbitrators indifferently chosen and elected by the parties, to award, order, adjudge and determine of and concerning all manner of bargains, actions, causes of action, suits, bills, bonds, specialties, judgments, executions, extents, accounts, debts, dues, sum and sums of money, quarrels, controversies, trespasses, damages and demands whatsoever, both in law and equity, or otherwise howsoever, which at any time or times heretofore had been made, moved, brought, commenced, sued, prosecuted, committed, omitted, done, or suffered by or between the said parties, or either of them." That the arbitrators made an award pursuant to the condition of the bonds, and did, amongst other things, award that the defendant should pay to the plaintiff the sum of four hundred dollars, on or before the 1st day of

(a) *Vide Perkins v. Wing*, 10 *Johns. Rep.* 143. *Wheeler v. Van Houten*, 12 *Johns. Rep.* 311. *Byers v. Van Dusen*, 5 *Wendell*, 268

December, 1810, and assigned, as a breach, the non-payment of the said sum.

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On the trial of the cause, the facts necessary to be proved on the part of the plaintiff, in support of his declaration, being admitted, the counsel for the defendant offered to prove, in bar of the plaintiff's recovery, that at the time the parties submitted their disputes to arbitration as aforesaid, there were only two disputes or controversies which had arisen, and were then depending between them; one an indictment for a forcible entry and detainer found against the defendant on the prosecution of the plaintiff; the other an action of trespass in the *Orange Common Pleas*, by the plaintiff against the defendant; that, on the hearing before the arbitrators, the plaintiff offered to prove, that the defendant had been guilty of fraud in the sale of a farm, to him, some years before, by misrepresenting the value of the farm, and claimed damages for the injury he had sustained by such pretended fraud; *that the defendant's counsel then objected to the introduction of such testimony, but it was admitted by the arbitrators, who founded their award, in part, on that evidence; a considerable portion of the sum awarded to be paid by the defendant being intended by them, as a compensation to the plaintiff for the damages he had sustained by such pretended fraud. That at the time of the said submission, no dispute or controversy had arisen or existed between the parties relative to the sale of the farm; and that before that time, the farm in question by virtue of a power contained in a mortgage thereof, executed by the plaintiff to the defendant, had been sold at public auction, in conformity to the provisions of the statute, and a complete title thereto again become vested in the defendant; that the facts alleged by the plaintiff relative to the conduct of the defendant, in the sale of the farm, as the same were proved before the arbitrators, did not amount to fraud either in law or equity, and therefore furnished no cause of action to the plaintiff against the defendant. To this evidence the counsel for the plaintiff objected, contending that the facts, if true, formed no bar to the plaintiff's recovery; and the evidence was overruled by the judge, who directed the jury to find a verdict for the plaintiff for the sum awarded, with interest.

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A motion was made to set aside the verdict, and for a new trial.

J. Duer, for the defendant. 1. The evidence offered by the defendant, at the trial, and rejected by the judge, ought to have been received. However general the terms of the submission may be, the power of the arbitrators is limited to matters actually submitted, or to differences existing at the time. The object of the submission must be existing controversies; for it is absurd to suppose, that the parties could mean to submit to the decision of arbitrators, matters about which there was no dispute. The definition of an arbitrator, as well as

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the terms used in the submission, show that existing differences only can be the subject of submission. By the civil law, though the submission be general, yet the power of the arbitrators is limited to existing controversies. (1 *Domat*. 213 *Dig.* lib. 4. tit. 8. 1. 21. s. 6.) Without such a restriction, the power of arbitrators would be unlimited and arbitrary; and they might decide on matters never foreseen or contemplated by the parties, themselves, as subjects of controversy.

In the case of *Ravee v. Farmer*, (4 *Term Rep.* 146,) the defendant pleaded an award, pursuant to a submission, of *all* matters in difference between *the parties, and the plaintiff replied, that the subject matter of that suit was not included in the reference; and, on motion to set aside the verdict, the court said, that the plaintiff might show that the matter was not in difference between him and the defendant, at the time of the submission, nor referred to the arbitrators. And, in the case of *Golightly v. Jellicoe*, (4 *Term Rep.* 146, note,) where the plaintiff replied, that the subject of the action was never laid before the arbitrators, Lord *Mansfield* said, the only question was, whether a submission of *all matters in difference*, was a submission of *matters not in difference*. (*Kyd on Awards*, (2d edit.) 179, 180. *Dig.* lib. 4. tit. 8. 1. 43.)

When ancient strictness, and modern liberality, are spoken of, we mean that strictness, in the construction of awards, which tended to defeat them; and that liberality, which seeks to carry into effect the intention of the parties.

2. The terms of the submission, though general, do not include the matter of *fraud* in the sale of land. The words "causes of action," must be understood to mean a legal ground of action; and if it could be shown that the matter alleged would not afford a cause of action, in law or equity, it could not be within the submission.

3. *Parol* evidence was admissible to show that the arbitrators exceeded their authority; and it is not necessary that the excess of authority should appear on the face of the award. The rule, that nothing *dehors* the award can be given in evidence, does not apply to this case; for it would be absurd to say, that if arbitrators exceed their authority, the award is void, and at the same time, reject the only evidence which can show that their authority has been exceeded. The rule is general; and I find no authority limiting it to the case where the excess of authority appears on the face of the award. That the award was not ready to be delivered at the time, and that the arbitrators were insane, are facts *dehors* the award, and yet *parol* evidence is admissible to show them. It will be said, that an award is equivalent to a judgment; and nothing extrinsic to a judgment can be offered in evidence to impeach it; and *Barlow v. Todd*, (3 *Johns. Rep.* 367,) *Wills v. M' Cormick*, (2 *Wils.* 148,) and *Kyd*, (*Kyd on Awards*, 328,) will be relied on by the counsel on the other side. The court, in

Barlow v. Todd, seemed to rely on the authority of *Wills v. M' Cormick*; but they might have proceeded on another ground, the state of the pleadings. I do not understand, *Kyd*, or the court, in *Wills v. M' Cormick*, as meaning to lay down the broad rule, that *parol* evidence is, in *all cases*, inadmissible to impeach an award. (8 *East*, 346.)

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*There is a wide difference between arbitrators exceeding their authority, and mistaking or abusing it. In the former case, it is analogous to a court acting without jurisdiction. A judgment, which would be otherwise final and conclusive, may be set aside on the ground of a want of jurisdiction. In *Baspole's Case*, (8 *Co.* 98,) in answer to the second objection, Lord Coke says, "When the submission is general of all actions, &c. *generale nihil certi implicat*; and, therefore, it may well stand with the generality of the words, that there was but one cause depending in controversy between them." The rule is laid down by *Denniston, J.* in *Hawkins v. Colough*. (1 *Burr.* 277. See, also, 1 *Saund.* 32. note. *Palmer's Rep.* 107. *Hutton*, 9. *Hob.* 119.)

In *Morris v. Reynolds*, (1 *Salk.* 73,) *Holt*, Ch. J. said, that arbitrators being judges of the party's own choosing, the party shall not come and say they have not done him justice, and put the court to examine it; *aliter*, where they exceed their authority.

It may be said, perhaps, that in all the cases cited, there was something on the face of the award, which rendered it ambiguous, and that *parol* evidence was, therefore, admissible to explain it. If so, then awards cannot be considered as certain and conclusive as judgments. But the court say, on the legal construction of the words "of and concerning the premises," we intend that the arbitrators did not exceed their authority, but if you can show the contrary, you may do it.

In all the cases in which *parol* evidence has been held inadmissible to impeach the award, as partiality and corruption of the arbitrators, or because the award is against law or justice, &c. there are solid reasons for rejecting *parol* evidence; but I can discern no solid reason for rejecting such evidence in a case like the present.

Storey and *S. Jones, jun. contra.* The terms of submission were as broad and comprehensive as language could make them. It is objected that the arbitrators decided on a matter not in dispute between the parties; but who is to decide on that fact, unless it be the arbitrators. The alleged fraud, in the sale of the farm, was existing at the time of the action, and it being brought before the arbitrators, they were bound to decide upon it. In deciding on the fact of fraud, they must have necessarily determined whether it was a good cause of action. We do not deny that an award may be bad, where the arbitrators exceed their authority; and that *parol* evidence

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is admissible where it does not contradict, or enlarge, or restrain the terms of the submission. But if admitted in this *case, it clearly goes to restrain and narrow the submission. The rule laid down in *Barlow v. Todd*, is general and positive, and perfectly conclusive in the present case. An award is like a judgment, and parol evidence cannot be admitted to show that a court adjudicated on a matter not stated in the pleading, or comprised in the action brought before them. (a) In *Newland v. Douglas*, (2 *Johns. Rep.* 63,) this court held that parol evidence was inadmissible to show a palpable mistake or miscalculation of arbitrators.

Duer, in reply, said that he did not pretend that parol evidence was admissible to explain or contradict the terms of the submission. Arbitrators, like all other persons acting under delegated powers, must pursue the terms of their authority. The terms used in this submission are merely to specify the subjects of difference. There must be an existing and legal cause of action. Parties never can be supposed to submit to the decision of arbitrators, matters about which there is no dispute, and where their rights are clear and undoubted. If the arbitrators have power to decide on the meaning of the words "causes of action," and to give them what construction they please, there is an end to all distinction between a general and a special submission. Suppose the submission had been as to a bond or specialty, and the arbitrators should choose to consider a promissory note as a *specialty*, and decide upon it, would their award be valid?

Per Curiam. The submission in this case was general, and embraced "every demand and cause of action, in law or equity." No language could have been more comprehensive. If the allegation of fraud, in the sale of the farm, was true in fact, it was a cause of action embraced by the submission. (1 *Salk.* 211. 1 *Lev.* 102.) Parol evidence is not admissible to limit the extent of the submission, and to show that it was to be confined to matters actually in *dispute or controversy*; for this would be to contradict the bond. Nor can the defendant be admitted to show there was no such fraud as was alleged, for that would be to open the merits of the award, and to try over again a matter which had been included in the submission and the award. It was for the arbitrators to decide, *secundum allegata et probata*, whether the charge of fraud was made out. Their decision upon the point was final, according to the doctrine laid down in *Barlow v. Todd*. (3 *Johns. Rep.* 367.) The evidence offered, on the part of the defendant, *was, therefore, properly rejected at the trial, and the motion to set aside the verdict is denied.

Motion denied.

(a) But see *Seddon v. Tutop*, (6 *Term Rep.* 607.)

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THIS was an action of ejectment. The cause was tried at the *Orange* circuit, in *September*, 1811. At the trial of the cause the title of the lessor of the plaintiff was admitted. The counsel for the defendant then offered to prove the following facts, in bar of the plaintiff's recovery; that previous to the commencement of the present suit, the lessor of the plaintiff and the defendant mutually entered into bonds of arbitration, which were respectively conditioned to abide and perform the award of certain arbitrators indifferently chosen and elected, to arbitrate, award, order, adjudge and determine of and concerning "all manner of bargains, actions, causes of action, bills, bonds, specialties, judgments, executions, extents, accounts, debts, dues, sum and sums of money, quarrels, controversies, trespasses, damages and demands, whatsoever, both in law and equity, or any otherwise whatsoever, which at any time or times heretofore have, had, been, moved, brought, commenced, sued, prosecuted, committed, omitted, done or suffered by or between the said parties, or either of them," &c. That the arbitrators, afterwards, and before the commencement of this suit, duly made and published their award, pursuant to the condition of the said bond, and did, *inter alia*, award that the lessor should pay to the defendant the sum of four hundred dollars, good and lawful money of the *United States*, at or upon the first day of *December* next ensuing the date of the award, and the further sum of five hundred and twenty-five dollars, on or before the first day of *May* following; and further, that if the lessor should give unto the defendant good security for the payment of the two before-mentioned sums of money, that then and in that case the defendant should, within thirty days after such security should be given, or offered to be given, deliver up to the lessor, his heirs and assigns, full and peaceable possession of the farm whereon the defendant, *De Long*, then lived; (being the premises in question;) but in case the lessor should neglect or refuse to give the security aforesaid, that then the defendant should be entitled to the possession of the said farm, until the two before-mentioned sums of money should be paid. The execution and delivery of the bond, and the making and publishing the award were admitted.

On a general submission to A. & B. arbitrators of all actions and causes of action, &c. the arbitrators awarded that A. should pay to B. two several sums of money at certain periods, and if he should give to B. "good and sufficient security for the payment of the said sums of money," that then B. should deliver up to A. the quiet and peaceable possession of a certain farm, on which B. then lived; but in case A. should neglect to give such security, then B. should be entitled to keep possession of the farm until the money was paid. It was held, that as the award did not define the nature and extent of the security to be given by A. it was void, for uncertainty. (a)

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A witness, on the part of the defendant, stated that some time in the month of *May*, in the year 1810, the lessor, in the presence of the witness, proposed that all disputes and controversies then pending between him and the defendant should be settled by arbitration, and that the proposals were assented to by the defendant, and the bonds above-mentioned were accordingly prepared and executed. That at the time of the submission, the witness knew of only two disputes or contro-

(a) Certainty to a common intent is sufficient in an award. *Jackson v. Ambler*, 14 *Johns. Rep.* 96. Where the parties have power to transfer real property, arbitrators may award that they shall do it. *Cox v. Jagger*, 2 *Cowen*, 638. And an award settling the boundaries of land will enable the party to whom the land is awarded, to bring ejectment. *Sellick v. Addams*, 15 *Johns. Rep.* 197.

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versies pending between the parties, one relative to an indictment under the statute of forcible entry and detainer found against the lessor, at the prosecution of the defendant, for a forcible entry on the premises in question ; the other an action of trespass in the common pleas of *Orange* county, and that no other disputes or controversies were mentioned or referred to by the parties. This evidence was objected to by the plaintiff, and a verdict was taken for the plaintiff, subject to the opinion of the court on a case containing the above facts.

Duer, for the plaintiff, contended, that all that part of the award, relative to the lessor's giving security, and the defendant's continuing in possession, was bad ; (2 *Bulst.* 260. *Str.* 1026 ;) but admitting it to be good, it could give no title or possession that would bar an action of ejectment. The case of *Johnson v. Wilson* (*Willes*, 250) was conclusive to show that the award is imperfect and uncertain, and, therefore, void.

Storey, contra, insisted, that though an award could not transfer a title or freehold ; yet it might give the temporary possession or holding, so as to bar an ejectment. He cited *Doe v. Rosser*, (3 *East*, 15,) 4 *Dallas*, 121, 122.

Per Curiam. The defence offered by the defendant was insufficient. The award directed that the lessor of the plaintiff should pay to the defendant two several sums of money at different periods, and that if he gave the defendant "good and sufficient security for the payment," the possession of the premises was to be delivered to him. But as the award has not defined the nature of the security, and whether it was to consist of real or personal security, or to what extent, it is so far void, for uncertainty ; and the lessor of the plaintiff, who is admitted to have a good title to the premises, is entitled to recover without any previous tender of security.

Judgment for the plaintiff.

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*COLEMAN against SOUTHWICK.

Where a declaration for a libel, after stating the plaintiff's good name, &c. stated that the defendant well knowing the premises, &c. maliciously intending to injure the plain-

THIS was an action for a libel. The declaration stated that the plaintiff was a good and faithful citizen of the *United States*, and of good fame, &c., and pursued the occupation and employment of editor of a certain newspaper printed and published in the city of *New-York*, called the "*New-York Evening Post*," by which he acquired great gains and emoluments, &c. Nevertheless, the defendant well knowing the premises, but contriving and maliciously intending to injure and aggrieve the plaintiff in his good name, &c., and also in

his occupation and employment, and to bring him into great scandal, infamy, and disgrace, and to cause it to be believed, &c., that the plaintiff had been guilty of the crime of treason, and of the promulgation of treasonable sentiments, and that the plaintiff had attempted to excite a *civil war*, &c., and was under the influence of an unprincipled devotion to *Great Britain*, &c., on the 3d October, 1809, at the city of *Albany*, wrote and published in a newspaper, printed and published by the defendant, called "*The Albany Register*," a certain false, scandalous and malicious libel, containing, among other things, the false, scandalous and malicious words and matters following. [Here the whole publication was set forth with *innuendoes*, but it is unnecessary, in reference to the decision of the court, to set forth the libellous paper and the other papers read at the trial, and inserted in the case.]

The publication of the defendant referred to and recited a piece as taken from the *Evening Post*, of *Tuesday* evening, *Aug. 23*, 1809, and which made the subject of the alleged libel.

By reason of the writing, printing and publishing of which said false, scandalous and malicious libel, &c., the plaintiff alleged he had been greatly injured in his good name, &c., and had been strongly suspected by those to whom his innocence was unknown, of the crime of treason, and of promulgating treasonable sentiments, and also of an unprincipled devotion to the cause of *Great Britain*, and had likewise been injured in his occupation and employment, and subjected to great personal scandal, hatred and infamy, &c., to the damage of the plaintiff 5,000 dollars.

*The defendant pleaded the general issue, and gave notice that he would give in evidence, in justification of the publication, that the matter contained in the supposed libel was true; and set forth in his notice, an article published in the *New-York Evening Post*, of the 19th *August*, 1809, as containing the sentiments imputed to him by the defendant; and further, that the supposed libel is composed of an article, purporting to be an extract from the *New-York Evening Post*, published by the plaintiff on the 23d of *August*, 1808, and of remarks upon that extract and on the plaintiff, in reference to his having published the matter and sentiments therein contained; and that the defendant copied the said extract from, and published it on the authority of a certain newspaper, printed in the city of *New-York*, called the *Public Advertiser*, and that the defendant believed it to be a true extract, according to the purport thereof; and that it is substantially a true extract, from the articles published by the plaintiff in the *Evening Post*, on the 19th and 23d of *August*, 1809, and that as to the literal variance therein, the defendant did, in the next paper

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tiff, &c. and to bring him into great scandal and disgrace, and to cause it to be believed that the plaintiff had been guilty of the crime of treason, and of the promulgation of treasonable sentiments, &c. published the libel; it was held that these were not averments necessary to be proved, but mere suggestions, by way of inducement to the libel.

Where *A.* published a libel, taken from a paper published by *B.* as an extract from a paper published by *C.* it was held, in an

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action brought by *C.* against *A.* that the testimony of *D.* that he heard *A.* before he published the libel, ask *E.* whether he had not seen it, in the paper of *C.* and that *E.* answered that "he had," was inadmissible, in mitigation of damages; but that *E.* himself should be produced if his declarations were proper evidence. (a)

In actions for slander, libel, and other personal torts, the court will not grant a new trial, on the ground of ex-

(a) The admissions and declarations of a person who is himself a competent witness cannot be given in evidence. *Woodward v. Paine*, 15 *Johns. Rep.* 493. Even the declarations in *extremis* of one who if living would be a competent witness are inadmissible. *Wilson v. Beaman*, 15 *Johns. Rep.* 286. And in order to give evidence of what a witness swore on a former trial between the same parties, it must first be affirmatively shown that the witness is dead. *Powell v. Walters*, 17 *Johns. Rep.* 176. *Wilbur v. Selden*, 6 *Cowen*, 162.

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cessive damages, unless the amount of damages is so flagrantly outrageous and extravagant, as manifestly to show that the jury must have been actuated by passion, partiality, prejudice, or corruption. (a)

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published by him, after the one containing the supposed libel, on being informed of the variance, publish an entire correction thereof, &c. The cause was tried at the *New-York* sittings, in *June*, 1811, before Mr. Justice *Thompson*.

The plaintiff proved the publication of the libel by the defendant, in the *Albany Register*. The counsel for the defendant then moved for a nonsuit, on the ground that the libel produced and read in evidence, did not support the charge of treason, as alleged by the plaintiff, but the motion was overruled by the judge.

Samuel North, a witness for the defendant, testified, that the extract purporting to be taken from the *Evening Post*, was seen by him, in the *Public Advertiser*, a newspaper printed in the city of *New-York*, dated 23d of *September*, 1809, in the defendant's possession, on *Saturday*, before the publication complained of, and that the *Evening Post*, published by the plaintiff, arrived in *Albany* on the morning of the 2d of *October*, 1809, when the witness saw it in the possession of *D. Rodman*, and discovered that the plaintiff had denied the publication, as stated in the *Public Advertiser*; but the witness did not inform the defendant of this fact until nine o'clock in the evening of that day, when several hundred of the papers of the defendant were struck off, to be sent by the western mail; but were not then actually sent.

The defendant then offered to prove, by the same witness, that *on *Saturday*, the 30th of *September*, 1809, he heard the defendant ask *Henry Stanley*, a resident of the city of *New-York*, whether he recollected that the extract, as published in the *Public Advertiser*, had appeared in the paper published by the plaintiff, and *Stanley* replied that he did. This evidence was objected to by the plaintiff's counsel and rejected by the judge.

Solomon Allen, a foreman in the printing-office of the defendant, testified, that the defendant did not take the *Evening Post* published by the plaintiff, but the *Herald*, which came by mail, and did not arrive in *Albany* until after the papers of the defendant on the third of *October* were all struck off. That they usually strike off, on *Monday* evening, about four hundred papers for the western mail, which closes at eight o'clock in the evening; that the remainder of the impression is made on *Tuesday* morning. That the editor's remarks are usually delivered to the witness on *Saturday* or *Monday*, before noon, to be printed. That the paper produced, bearing date the sixth of *October*, was published by the defendant, and contained the extracts from the *Evening Post*, corrected.

The witness further stated, that the impression of the defendant's paper amounted to between 1,500 and 2,000 copies, and that to have struck out the libellous matters after eight o'clock, on *Monday* evening, and substituted other matter, would have detained the press about three hours; and that to have struck out the libellous matter, and inserted a

(a) Acc. *Southwick v. Stevens*, 10 *Johns. Rep.* 443. *Moody v. Baker*, 5 *Cowen*, 351. *Cole v. Perry*, 8 *Cowen*, 214. *Root v. King*, 7 *Cowen*, 613. *Douglas v. Tonney*, 2 *Wendell*, 322. *Sargeant v. —*, 5 *Cowen*, 106.

notice to the public that the extract was incorrect, would have occasioned a delay of several hours; but might have been done in the course of the night; but that neither was done, and the paragraph in question passed through the whole impression. It was usual for the defendant, when any news of importance arrived, to stop the press, and insert it, in the place of matter deemed less important. The printer of the *Evening Post* testified that the alterations mentioned might have been made in one hour.

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en, 106.

The plaintiff's counsel then read the whole of the editorial article in the defendant's paper of the 6th of *October*, 1809, on the subject of the libellous publication in question, of which an extract only had been read on the part of the defendant. The plaintiff's counsel also read the whole article contained in the *Public Advertiser* of the twenty-third of *September*, part of which had been read by the defendant's counsel. The explanatory publication of the plaintiff, contained in his paper of the twenty-ninth of *September*, was also read to the jury.

The judge, in his charge to the jury, stated, that in his opinion, the defendant had been guilty of publishing the libel, as charged in *the plaintiff's declaration; that the amount of damages would much depend upon the fact, whether the publication, as extracted from the *Public Advertiser*, was a mistake, or intentional; that is, whether the defendant, at the time of the publication of the libel, knew that the extract from the *Evening Post*, by the editor of the *Public Advertiser*, was incorrect; that this was a matter of fact for the jury to determine.

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The jury found a verdict for the plaintiff, for 1,500 dollars damages.

A motion was made to set aside the verdict, and for a new trial, on the following grounds:

1. That the judge ought to have nonsuited the plaintiff;
2. That the testimony of *North*, as to what he heard *Stanley* say to the defendant ought to have been admitted;
3. That the jury ought to have been charged to find a verdict for the defendant; or if for the plaintiff, to find no more than nominal damages, as the publication by the defendant was made under a mistake of the fact.

Foot, for the defendant.

Van Vechten, contra.

KENT, Ch. J. The defendant moved for a new trial upon the following grounds:

1. That the plaintiff ought to have been nonsuited at the trial.
2. That the testimony of *Samuel North*, as to what he heard *Stanley* say, ought to have been received.

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3. That the jury ought to have been directed to find for the defendant, or at most but nominal damages for the plaintiff, because the publication was made under a mistake of the fact.

The declaration states, by way of inducement to the libel, that the defendant maliciously intending to bring the plaintiff into public scandal, and to cause it to be believed that he had been guilty of treason, and of promulgating treasonable sentiments, &c. published the libel. The counsel stated that these were averments requisite to have been proved upon the trial, and that for want of showing the existence of the charge of treason, the plaintiff ought to have been nonsuited. The answer is, that they are not such averments, but suggestions stated as mere inducement to the libel. It was not traversable matter any more than the ordinary preliminary suggestions in a declaration in slander, that the plaintiff is of good *name, fame, &c. The averments requisite to give meaning and application to the libel, must be proved, and were proved in this case. The meaning of the libel, and its application to the plaintiff, were apparent on the face of the paper, and all that was required to support that meaning and that application, was the production of the paper, and the proof of its publication. The meaning imputed to it in the declaration, when the true meaning of the libel, and not the mere inducement to it, is averred, was obvious from the paper itself.

2. The next point is, that the testimony of *Samuel North* ought to have been received, when he offered to prove that he heard the defendant ask one *Henry Stanley*, who resided in *New-York*, whether he recollected the extract, as published in the *Public Advertiser*, appearing in the plaintiff's paper, to which *Stanley* replied, that he did. This point appears to me to be as untenable as the other.

The cases which are the most analogous, are those which were cited from *Binney's Reports*. In *Kennedy v. Gregory*, (1 *Binney*, 85,) it was held that the defendant, in an action of slander, might give in evidence, in mitigation of damages, that a third person told him what he related. But it ought to be observed, that in that case the person who gave the information, was the witness offered to prove it. So in the case of *Morris v. Duane*, (1 *Binney*, 90, *note*,) the defendant was allowed to give in evidence, in mitigation of damages, in an action for a libel, a paper containing the libellous charge, which had been in possession of a preceding editor, then dead, and to whose paper the defendant had succeeded as editor. These decisions are certainly entitled to great respect. Perhaps they have even extended the *English* rule; and they would have applied, if *Stanley* himself had been offered as a witness to prove his disclosure to the defendant. But to resort to a bystander to prove what *Stanley* might have told the defendant, when *Stanley* was within the reach of the defendant, and could have been produced, is going beyond

the cases cited, and would be a dangerous relaxation of the rules of evidence. The established doctrine is, that you must go, if you can, to the source of testimony, and not introduce a copy, when the original is to be had, nor undertake to prove what another person has been heard to say, when that person is a good witness, and can be produced. The testimony of *North*, though not, technically, hearsay evidence, is liable to the same objections; for it is resorting to an inferior or *secondary species of proof, without necessity; and, permit me here to add, that no one thing, in the administration of public justice, concerns more seriously the security of life, liberty, and property, than a firm disposition in the courts to adhere to the established rules of evidence. Why not produce *Stanley* to testify what he told the defendant, instead of resorting to a bystander who heard what he said? The latter evidence cannot be relied on, as equally original and accurate. *Stanley* knew what he meant to communicate, which the other could not know. *North* might not have heard correctly what he did say, or all that he said. Another part of the conversation which preceded or followed, might have explained the words which *North* heard, or varied their meaning. *North* might have misunderstood *Stanley*, or not have known whether he was in earnest, or was so understood by the defendant, or whether the conversation was or was not the result of a previous agreement between the defendant and *Stanley*, for the very purpose of providing for this case. Hearsay testimony is, from the very nature of it, attended with all such doubts and difficulties, and it cannot clear them up. "A person who relates a hearsay, is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities: he intrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author." It is against sound principle, and would at once awaken distrust, for a party to resort to a secondary species of evidence, so long as the original and primary evidence exists and can be produced. The plaintiff, by means of this species of evidence would be taken by surprise, and be precluded from the benefit of a cross-examination of *Stanley*, as to all those material points which have been suggested as necessary to throw full light on his information. The testimony of *North*, as to what he heard *Stanley* say, could not afford the degree of proof which the fact might allow, nor admit those inquiries which conduce to a full and satisfactory explanation of what was related, and it was therefore properly rejected.

3. The last point is, that the damages ought to have been nominal only, because the publication was made under a mistake of the fact. The *quo animo* with which the libel was published, was altogether a matter for the consideration of the

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jury; and the circumstances which might tend to aggravate or extenuate the damages, and lessen or increase the degree of malice which the law *imputes to the publication of every unjustifiable libel, were no doubt urged to the jury upon the trial, as they have since been presented to this court, upon the argument of the present motion. The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, we cannot, consistently with the precedents, interfere with the verdict. It is not enough to say, that in the opinion of the court, the damages are too high, and that we would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries.

We can judge better of the legal and constitutional effect of a verdict, in a case like this, by recalling to our attention some of the adjudged cases.

In *Hawkins v. Sciel*, 20 Jac. I. (*Palm.* 314,) the plaintiff recovered one hundred and fifty pounds in slander, for calling him a bankrupt, and the court thought fifty pounds enough; but, upon solemn advice, they would not reduce the damages, nor change the course of the law, and resolved that it was better to leave such matters to the jury. The case of *Townsend v. Hughes*, 28 Car. II. (2 *Mod.* 150,) was an action of *scandalum magnatum*, and the jury gave £4,000 damages. A motion was made for a new trial, on account of the excessive damages; but the court denied the motion, and said that the jury were the judges of the damages; and one of the judges observed, "suppose the jury had given a scandalous verdict for the plaintiff, as a penny damages, he could not have obtained a new trial in hopes to increase them, neither shall the defendant in hopes to lessen them." If the court could not say that these damages were excessive, they can hardly say so in any case of slander, and yet the Court of C. B. of which Lord *Camden* was one, observed, near a century afterwards, that that case had never been contradicted or denied to be law. In *Roe v. Hawkes*, 15 Car. II. (1 *Lev.* 97,) the court made the like decision, where the damages, in a common case of slander, were seven hundred pounds. These were old cases, and Lord *Camden* says, (2 *Wils.* 249,) that there seemed to be only one case before his time where a new trial was granted in actions for *torts*, and that was the case of *Chambers v. Robinson*, (1 *Str.* 691,) where the jury gave £1,000 damages in an action for a malicious prosecution. And he observed, that the court *were free to say, *that* case was not law, as the reason assigned for the new trial,

which was to give the defendant a chance of another jury, would be digging up the constitution by the roots. But in the early part of the reign of Geo. III. and prior to our revolution, there is a series of cases relative to the power of the jury over the damages, in actions for *torts*, which are more interesting, because, while they support with just spirit and firmness the constitutional prerogative of the jury, they define the limits of their power with greater precision, and settle it upon sound principles. The courts say there is a great difference between cases of damages which can certainly be seen, and such as are ideal, as between *assumpsit*, *trespass for goods*, &c. where the sum and value may be measured, and actions of false imprisonment, malicious prosecution, slander, and other personal *torts*, where the damages are matter of opinion. The law has not laid down what shall be the measure of damages in actions of *tort*. The measure is vague and uncertain, depending upon a vast variety of causes, facts and circumstances, as the state, degree, quality, trade, or profession of the party injured, as well as of the party who did the injury. The court cannot interfere, unless the damages are apparent, so that they can properly judge of the degree of the injury. Generally, in such cases, they cannot say whether five hundred pounds was too much, or fifty pounds would have been too little. The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess. These are the principles which have been laid down by the most eminent judges who have presided in the *English* courts, since the year 1760; and by which they have uniformly governed themselves in cases in which the damages would appear to have been, beyond all comparison, more excessive than in the present case. (*Leeman v. Allen*, 2 Wils. 160. *Boardman v. Carrington*, 2 Wils. 244. *Wilford v. Berkley*, 1 Burr. 609. *Redshaw v. Brook*, 2 Wils. 405. *Bruce v. Rawlins*, 3 Wils. 60. *Huckle v. Money*, 2 Wils. 205. *Leith v. Pope*, 2 Black. Rep. 1327. *Gilbert v. Bartenshen*, Cowp. 230. *Duberley v. Gunning*, 4 Term. Rep. 651.) In one case, in an action for *crim. con.* the jury gave £5,000; and Lord Kenyon said, he would have been satisfied if only nominal damages *had been given, yet he knew of no case that would authorize the court to interfere, and he said he had not courage enough to make the first precedent. The doctrine contained in these cases has been acknowledged to be sound law, and has been adopted and sanctioned by the Supreme Court of *Massachusetts*, in the case of *Coffin v. Coffin*, (4 Tyng, 1,)

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and by this court, in the case of *Tillotson v. Cheetham*, (2 *John. Rep.* 63.)

There is no pretence to say, that the amount of the verdict, in the present case, is so extraordinary and extravagant, as to justify the court, under the above cases, to set it aside. The precedent would be new and dangerous.

I am accordingly of opinion, that the motion, on the part of the defendant, be denied.

THOMPSON, J. and VAN NESS, J. were of the same opinion.

SPENCER, J. I am under the necessity of differing from a majority of the court, upon the competency of *Samuel North*, to prove the information given to the defendant by *Stanley*. I concur in the opinion, that the plaintiff ought not to have been nonsuited on the ground taken by the defendant's counsel. I shall not enter upon the question of excessiveness of damages, and desire to be understood, as neither denying or supporting the doctrine advanced by a majority of the court upon that point, as applicable to the case before us.

The only point I mean to discuss or decide is this; was *North* a competent witness to prove the declarations made by *Stanley* to the defendant?

I understand my brethren to concede, that had *Stanley* himself been offered as a witness to prove the same facts, he would have been admissible to prove them. Of this I think there can be no doubt.

Upon a consultation of the twelve judges in the case of *Smith v. Richardson*, (*Willes*, 20,) it was agreed, that in actions of slander, malice was the *gist* of the action, and that evidence showing the manner and occasion of speaking the words, and that they were not spoken maliciously, had always been admitted, and that what could not be pleaded, might be given in evidence, in mitigation of damages. By a parity of reasoning, this doctrine equally applies to actions for libels; at all events, so far as respects the question of damages. To the same point may be cited the opinion of Chief Justice *Tilghman*, (1 *Binney*, 90,) which I consider entitled to great respect, from the high legal reputation of that distinguished judge.

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**Stanley's* declarations to the defendant were offered to be proved, with the view of showing to the jury, that the defendant had an additional motive for believing that the publication, which was the foundation of the suit, and extracted from the *Public Advertiser*, had been, in fact, published in the plaintiff's paper.

This evidence was offered, to show *quo animo* the defendant republished the extract. If *Stanley's* information to the defendant induced him to believe the extract he published had been published in the plaintiff's paper, then it went so far to show that his intention in the republication was not malicious.

It is perfectly immaterial whether *Stanley* stated to the defendant the truth or not. The question is, did he make the statement, and had the defendant a right to believe him. The impression actually existing on the defendant's mind, at the time of the publication, was the *gist* of the inquiry.

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Now if *North* was present, and could swear (and he was offered for that purpose) that he heard the defendant make the inquiry of *Stanley*, whether he had seen the extract, published in the *Public Advertiser* in the plaintiff's paper, and heard *Stanley* say he had, *North* is as competent a witness to prove that conversation as *Stanley*. I repeat it, the point of the inquiry was, under what impressions did the defendant publish the libel.

The mistake into which the plaintiff's counsel have fallen is this: they have considered *North* as coming to prove a fact by hearsay, overlooking the circumstance, that the fact to be proved, was the state of the defendant's mind when he published the libel. The rule of law excluding hearsay evidence does not apply to this case. When a fact is to be made out, it must be proved, either by direct evidence of the existence of the fact, or by circumstances which go to establish the fact, and there hearsay is inadmissible, in general. Here *North*, if he heard the question and answer, is an original witness, as to the fact offered to be proved. He could relate the question and answer, as well and as faithfully, for aught we know, as the person who held the conversation.

The defendant's counsel, in offering to prove by *North* what *Stanley* said, did not offer it as evidence to prove the fact that *Stanley* had seen the extract in the plaintiff's paper, but only to prove that the defendant had been so informed, and was influenced by that information.

An agent who makes a bargain, may be a witness for or against the principal, in relation to the terms of the bargain; but if it be proved that he was an agent for the party, what he said in relation to the contract may be proved by any one, on the principle, that his words being part of his acts, are admissible against his principal. (*Peake*, 18. 7 T. R. 668.).

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There is no force in the objection, that *Stanley* is a better witness than *North*; for aught we know, *North* might have stated that he went with *Stanley* to the defendant's, that he remained constantly by his side, that he heard all that was said, and that he went away with him. To indulge the idea that the conversation was the result of preconcert, is presuming immoral conduct in the defendant or *Stanley*, and is against that benign principle of law, that *odiosa non sunt presumenda*.

Stanley was as much in the power of the plaintiff as of the defendant, and if the conversation was the result of artifice, the plaintiff might have called him to prove it.

I am fully satisfied that *North's* testimony ought to have

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been admitted, and that for this cause, there should be a new trial, with costs to abide the event of the suit.

YATES, J. was of the same opinion.

Motion denied.

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If a person out of possession conveys to a stranger land held adversely by another, the conveyance is void, so that the stranger cannot maintain an action upon it; and it [* 56]

seems not to be material as to the operation of the deed, that the knowledge of the adverse possession should be brought home to the parties, though it might be material, if either of them were prosecuted for the penalty given by the statute against selling pretended titles. (a)

Where a tenant in possession of land, claiming to hold adversely, after issue joined in an action of ejectment against him, received a deed or release of the premises from one of the lessors, it was held, that admitting the sale so made to be an act of maintenance, (a point not decided,) yet the deed was effectual, as between the parties to it, and a bar to the les-

THIS was an action of *ejectment*, to recover the possession of lot No. seventy-five, in the township of *Junius*, in the county of *Seneca*. The cause was tried at the *Seneca* circuit, in *June*, 1811, before Mr. Justice *Yates*.

The lot was conveyed, by letters patent, the 29th *January*, 1791, to *John Wilcox*, who executed a deed for his military lot to *Rufus Lathrop*, one of the lessors, in 1794. The plaintiff produced the letters patent, and a witness testified, that, about *thirteen years ago, he received the deed from *Wilcox* to *Lathrop*, which, after diligent search, he had been unable to find, and believed it to be lost. The defendant had been in possession of four acres of the lot, as tenant to *Elijah Miller*, from the 1st of *April*, 1808; and he gave in evidence a deed from *Rufus Lathrop* to *Elijah Miller*, for the lot, dated the 8th of *March*, 1811.

The plaintiff then gave in evidence a deed, dated the 8th of *April*, 1808, executed by *Rufus Lathrop* to *Joseph Nichols*, the other lessor, for the lot in question.

The defendant then produced in evidence a deed for the same lot, dated the 25th of *November*, 1807, and recorded the 27th of *March*, 1808, from *Samuel Lathrop* to *Elijah Miller*; and also a lease for the four acres possessed by the defendant, dated 4th of *April*, 1808, to him from *Elijah Miller*. It appeared that the defendant had cleared the four acres, and was in possession, before the date of the lease, and had continued in possession, as tenant to *Miller*, until the commencement of the suit.

The judge charged the jury, that the possession of the defendant was adverse to *Rufus Lathrop*, when he conveyed to *Joseph Nichols*, so as to prevent the operation of the deed, and that they ought to find a verdict for the defendant. And the jury found a verdict accordingly.

A motion was made to set aside the verdict, and for a new trial.

Gold, for the plaintiff, contended, that a possession, in order to oust a person having right, must commence by disseisin. (9 *Viner*, 85. *Diss. C. s.* 10, 11, 12. 1 *Leon.* 209. 1 *Salk.* 246 2 *Schoales & Lefroy*, 97. 12 *East*, 141. 1 *Johns. Rep.* 156. 6 *Johns. Rep.* 197.) The interference of *Miller* could produce no other effect than to constitute a tenancy at sufferance. It did not

(a) *Jackson v. Matsdorf*, 11 *Johns. Rep.* 91. A party selling land, is presumed conscious of an existing adverse possession. *Kussenfrat v. Kelly*, 13 *Johns. Rep.* 466. *Lane v. Steers*, 1 *Wendell*, 453. See *Jackson v. Sharp*, *infra*, 163.

affect the freehold, nor did it amount to a disseisin. What may create an adverse possession, so as to allow a limitation under the statute to commence, will not amount to a disseisin. This case does not afford an exception to the general rule on this subject. If a disseisin could commence, *ex post facto*, or subsequent to the original entry, yet there is no evidence in this case to support the fact.

Though the defendant consented to hold under *Miller*, yet the purchase, by *Miller*, of *Rufus Lathrop*, was, in itself, an act of *maintenance*; and the conveyance, therefore, fraudulent and void. (15 *Viner Maint. E. pl. 22, note. 1 Hawk. c. 86. s. 17.*) Though a person may purchase a pretended title, for the sake of peace, and to protect himself, yet he cannot make *such a purchase, for the purpose of injuring or defeating the title of another. (1 *Hawk. 557. c. 86, s. 17. Co. Litt. 36. a. 5 Johns. Rep. 489. 500.*)

The peculiar state of this country, so different from that of *England*, renders the doctrines about maintenance and disseisin inapplicable here, in their full extent. The cause of the *English* statutes against maintenance, has never existed in this country, where the course of justice flows free and uninterrupted by the influence of powerful men.

If *Rufus Lathrop* was disseised, he became, on the sale to *Nichols*, his trustee of the title, and the purchase afterwards by *Miller*, of *Lathrop*, was fraudulent and void.

Again, the deed or release from *Lathrop* to *Miller*, of the 8th of *March*, 1811, ought not to have been received in evidence, not only for the reasons already stated, but because, being since the issue was joined in the cause, it ought to have been pleaded *puis darrein continuance*, and entered on the *nisi prius* record. (7 *Johns. Rep. 194. 2 Rich. C. P. P. 13. Buller's N. P. 97. Yelverton, 180.*)

Rodman, contra, insisted, that the possession of the defendant, being under *Miller*, a person claiming title, was a disseisin of all persons claiming adversely; (1 *Caines, 90. 2 Caines, 183. 3 Johns. Rep. 159*;) that *Miller* being in possession by his tenant, (the defendant,) at the time of the deed to *Nichols*, that deed was inoperative, by reason of the adverse possession; that it was competent to *Miller*, or the defendant, to buy in an outstanding title or claim, in order to protect his own. (8 *Johns. Rep. 137.*)

The deed, admitting that it ought to have been pleaded, having been received in evidence, by consent, at the trial, must be considered as if it had been pleaded, and the plaintiff cannot now object to its admission or effect on that ground.

KENT, Ch. J. delivered the opinion of the court. Two questions arise on this case: 1. Is the lessor, *Nichols*, entitled to recover upon the deed from *R. Lathrop*, to him? 2. If not, then can *Lathrop* himself recover, in opposition to his

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nor who executed it. (a)

And where such a deed was given in evidence at the trial, by consent of the parties, it was held that though it regularly ought

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to have been pleaded *puis darrein continuance*, yet having been admitted by consent, it must have the same effect as if it had been duly pleaded. (b)

(a) Vide *Jackson v. Whaler*, 10 *Johns. Rep. 164. Jackson v. Foster*, 12 *Johns. Rep. 488. Jackson v. M^r Claskey*, 2 *Wendell, 541. Jackson v. Bell*, 19 *Johns. Rep. 168.*

(b) Vide *Jackson v. Bell*, 19 *Johns. Rep. 168.*

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deed to *Miller*, under whom the defendant holds? Unless we can answer one of these questions in the affirmative, judgment must be rendered for the defendant.

1. At the time of the execution of the deed, from *Lathrop* to *Nichols*, the defendant was in possession under *Miller*, who held the land under a deed from another source. The possession was then adverse to the claim or right of *Rufus Lathrop*, and it is a *well settled principle of law, that if a person out of possession conveys to a stranger, land held adversely by another, the conveyance is void, so that the stranger can not maintain an action upon it. Nothing passes by such a deed; for a right of entry, or a right in action, was not assignable by the common law. This doctrine is by no means a novel one, for it has been so frequently and uniformly acknowledged, both in *England* and in our own courts, that it has now grown to be familiar, and cannot be open for discussion. (*Litt. sect. 347. Co. Litt. ibid. and 369. a. Plowd. 88, b. 2 Sch. & Lef. 65. 105. 2 Caines, 183. Jackson v. Todd. 5 Johns. Rep. 489. Williams v. Jackson.*)

Indeed this principle was conformable to the whole genius and policy of the common law, by which a tenant could not aliene his fee or tenure, without the consent of his lord, nor the lord his seignior, without the consent or *attornment* of his tenant. (*Wright on Tenures, 166. 171.*) A feoffment was void without livery of seisin; and without possession, a man could not make livery of seisin. (*Perkins, s. 220.*) Nor was this principle peculiar to the *English* law. It was a fundamental doctrine of the law of *feuds*, on the continent of *Europe*. No feud could be created or transferred without investiture, or putting the tenant into possession. *Feudum sine investitura nullo modo constitui potest. Investitura proprie dicitur possessio.* (*Feudorum, lib. 1. tit. 25, lib. 2, tit. 2.*) And *Voet* says, that delivery of possession is still requisite in *Holland* and *Germany*, to the transfer of real property. (*Com. ad Pand. lib. 41, tit. 1, s. 38.*) It is no doubt the general sense and usage of mankind, that the transfer of real property should not be valid, unless the grantor has the capacity, as well as the intention, to deliver possession, and actually does it. *Blackstone* says, that it prevails in the codes of "all well governed nations," for possession is an essential part of the title and dominion over property. (*2 Com. 311, 312.*)

That the possession of *Miller* was in fact adverse to the right of *R. Lathrop*, is most clearly made out, because he was in possession under color and claim of title, by virtue of a deed from *Samuel Lathrop*. This amounted to one of the species of disseisins mentioned by *Bracton*, who says, (lib. 4, fo. 161, b.) that "disseisin may be not only when the owner, or his family or steward, are violently ejected, but also when the owner having gone abroad and left his possession unoccupied, he is denied entry on his return; and so it is if one uses an-

other's land against his *will, claiming it to be his own, *con-
tendendo tenementum esse suum quod est alterius.*"

In the modern case of *Doe v. Prosser*, (*Cowp.* 217,) Lord *Mansfield* gives a sample of what constitutes an adverse possession. "If upon demand by the co-tenant of his moiety, the other denies to pay and denies his title, saying *he claims the whole*, and will not pay, and *continues in possession*; such possession is adverse and ouster enough." It does not seem to be material, as it concerns the operation of the deed, that the knowledge of the adverse possession should be brought home to the parties, though it might be material, if either of them was prosecuted for the penalty given by the statute against selling pretended titles. In *Slywright & Page's Case*, (1 *Leon.* 166,) it was considered, that the deed might be void, and yet the party not liable to the penalty of the statute. "The first question in that case was, if the lease, being made by one out of possession, and not sealed and delivered upon the land, and so not good in law as to pass any interest, be within the statute aforesaid." But, in this case, the legal inference is, that *R. Lathrop* knew of the adverse possession of *Miller*, when he sold to *Nichols*, for he must be presumed to be acquainted with his own right; and the presumption is, that *Nichols* purchased under the same knowledge, for *Miller* had not only a tenant in actual possession, but his deed from *S. Lathrop* had been recorded several days before, and the lands lay in a county in which deeds, as well as mortgages, are required to be recorded. It is extremely improbable that *Nichols* purchased, without having previously inspected the state of the title upon record, and inquired into the claims of the actual occupant. He had, at least, constructive notice, or notice in law.

The title set up by the lessor, *Nichols*, most undoubtedly fails, and the next point is, whether the other lessor, *R. Lathrop*, is entitled to recover.

2. It might possibly be a question whether the acceptance of the deed from *R. Lathrop* to *Miller*, was not an act of maintenance in *Miller*, as it was taken after the suit was brought, (at least it was so understood upon the argument,) and, probably, with an intent to defend himself with it in that suit. But as *R. Lathrop* was one of the lessors of the plaintiff, and had the title of the land in himself, it was not very inconsistent with good policy that he should be enabled to sell, and the tenant in possession to purchase, for it was putting an end to the controversy. We mean *not, however, to discuss and decide this point, in the present case; for even admitting the sale to have been an act of maintenance, yet the deed was effectual, as between the parties to it. *Rufus Lathrop* cannot recover in opposition to his deed to *Miller*. It operates to estop him; and it seems to be a principle which runs through the books, that a feoffment upon maintenance or cham-

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perty, is good as between the feoffer and feoffee, and is only void against him who hath right. (*Bro. tit. Feoffments*, pl. 19 *Fitzherbert*, J. in 27 *Hen. VIII.* fol. 23. b. 24. a. *Co. Litt.* 369. a. *Cro. Eliz.* 445. *Beaumont*, J. *Hawk.* b. 1. c. 86. s. 3.) The consequence is, that when the question is upon the demise of *Rufus Lathrop*, his deed to *Miller* is an effectual bar to his recovery. The only objection that could have been made to the introduction of this deed, at the trial, (assuming it to have been given after suit brought and issue joined,) was, that, it ought to have been pleaded *puis darrein continuance*, so that it might have been returned as parcel of the *nisi prius* record. This is, no doubt, the general and proper course. (*Yelv.* 180. 2 *Rich. Com. Pleas*, 13.) But it is a sufficient answer to this objection, that the deed was admitted in evidence, and went to the jury, without opposition. It is, then, to be considered as admitted by consent, and is to have the same effect as if it had been duly pleaded.

Neither of the lessors of the plaintiff have, then, shown a right to recover. We cannot give effect to the deed to *Nichols*; because of the adverse possession existing at the time of the sale; and we cannot allow *Lathrop* to recover, in defiance of his own deed to *Miller*. To yield to the pretensions of either, would be shaking established principles; and, though *Nichols* may, perhaps, have ground to complain of the act of *Lathrop* in conveying to *Miller*, instead of lending his name and assistance to recover the possession of the land for him, yet that consideration cannot affect this case. In the action of ejectment, we must look steadily to the legal title. His remedy (if any) must be against *Lathrop*, for assuming to sell, when he was incapacitated to transfer his interest. *Nichols* cannot interpose in this suit, and prevent the operation of the deed to *Miller*. As to him, it is *res inter alios acta*. He must stand upon the strength of his own demise.

The motion to set aside the verdict is, therefore, denied.

VAN NESS, J. dissented.

Motion denied.

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*STUYVESANT *against* TOMPKINS AND DUNHAM.

A party must have actual and lawful possession of real property, to enable him to maintain *trespass*. The lands of A. and B. were separated by a crooked fence, and A. showed to B.

THIS cause came before the court, by a writ of error, from the Mayor's Court of the city of *New-York*. *Tompkins* and *Dunham*, the defendants in error, brought an action of *trespass quare clausum fregit*, against *Stuyvesant*. The defendant pleaded not guilty. From the *bill of exceptions*, taken at the trial, in the court below, it appeared that the plaintiffs were seised in fee of a certain piece of land, in the eighth ward of the city of *New-York*, and that the defendant was also seised of another piece of land, *adjoining* the land of the

plaintiffs. At the time of the supposed trespass, there was a fence between the two pieces of land, and the plaintiffs were in the actual possession of all the land on one side of the fence, and the defendant of all the land on the other side. The fence was *crooked*; and, in a conversation held between the defendant and *Dunham*, one of the plaintiffs, previous to the time of the supposed trespass, the defendant pointed out to the said plaintiff the two ends of the fence, as the extreme points of the boundary line between the two pieces of land, and declared that he believed the true boundary line between them was a *straight* line; but that he would examine the maps and papers, and see whether it was so or not. Afterwards, and before the supposed trespass, the defendant declared to the said plaintiff, that he had examined, and found the boundary line, between the two pieces of land, was a straight line. It was proposed, on the part of the plaintiffs, to employ a surveyor to run the line; but the defendant said it was unnecessary, as they could run it themselves. The plaintiffs, however, employed a surveyor, who ran a straight line between the two extreme points pointed out by the defendant, who saw the surveyor while running the line, and made no objection. The plaintiffs, then, caused a fence to be erected on such straight line, in a place beyond the first-mentioned fence, and in the actual possession of the defendant, who, afterwards, caused the fence, so erected, to be *thrown down*, which was the *trespass* complained of.

The defendant proved that he and his ancestors had been in possession of the piece of land mentioned, about twenty-five years preceding the commencement of the suit, during all which time the first fence had been the actual boundary between the two pieces of land, and *had been maintained by the plaintiffs, and those under whom they held; and, during all that time, the said fence had not been on the line run by the said surveyor; but the place in which the trespass was supposed to have been committed had been, during the whole of that time, in the actual possession and occupation of the defendant and his ancestors. After the line run by the surveyor, the defendant forbade the workmen, employed by the plaintiffs, to put up a fence on the line, who gave notice thereof to the plaintiffs, and the fence thrown down by the defendant was put up, after such notice. The plaintiffs purchased the piece of land owned by them of one *Mann*; and, previous to the execution of the deed, a survey was made, and by the map and survey, the first-mentioned fence was the boundary line between the two pieces of land; but *Mann* told the plaintiffs that such line ought to have been a *straight* line. The place in which the trespass was supposed to be committed, was not included in the land described by the map of such survey.

The RECORDER charged the jury, that they might, if they

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the two extreme points of the division line, and declared that the true boundary line was a *straight* line; and *B.* caused a *straight* line to be run between the two points, and put up another fence accordingly, by which he included some of the land which had been in the possession of *A.* and his ancestors, above 25 years; and before the fence was put up, *A.* gave notice to *B.* not to erect it; and, after it was put up, *A.* came and pulled it down. In an action of *trespass* brought against *A.* by *B.* it was held, that the *parol*

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declaration of *A.* was not sufficient to change the possession; and having availed himself of the *locus penitentie*, his previous admission did not sanction the change of the boundary line. (a)

(a) Vide *S. C.* in error, 11 *Johns. Rep.* 569. *Wickham v. Freeman*, 12 *Johns. Rep.* 183. *Hubbel v. Rochester*, 8 *Cowen*, 115. *Austin v. Sawyer*, 9 *Cowen*, 39. *Jackson v. Dysling*, 2 *Caines' Rep.* 198.

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thought proper, infer from the *parol* admissions of the defendant, that both parties originally intended to occupy, according to a *straight* line, and had occupied under a belief that the boundary was a *straight* line; and, if they believed it was so, then the defendant might be considered as holding by sufferance or permission, and that so the possession of the defendant was not adverse, and the plaintiffs had a right to maintain their action. The jury found a verdict for the plaintiffs, on which the court below rendered judgment.

Colden, and *D. B. Ogden*, for the plaintiff in error.

T. A. Emmet, contra.

Per Curiam. The charge of the recorder was incorrect, for the facts in this case clearly show that the plaintiffs below were not entitled to an action of trespass. The party must have actual and lawful possession of real property, to enable him to maintain trespass, and the plaintiffs below had not such possession. Their entry was, of itself, an act of trespass. The land owned by the parties respectively, was separated by a crooked fence, and the defendant below showed to one of the plaintiffs the two ends of the fence, as the extreme points of the boundary line between *them and declared that the true boundary line was a straight line. The plaintiffs then employed a surveyor to run the line, and the defendant saw the surveyor while in the act of running it, and made no objection, but went away before the surveying was completed. The surveyor ran a straight line between the extreme points so shown by the defendant, and the plaintiffs moved the fence according to the line so ran, and it was erected beyond the former fence, and on a place in the actual possession of the defendant. The defendant proved that for more than twenty-five years before the action, he and his ancestors had been seised and possessed of the *locus in quo*, and the fence so removed had been, for that length of time, the actual boundary line between the parties and those under whom they held. The defendant further proved, that after the line was run, he disapproved of it and forbade the fence to be removed on to his land, and after it was erected he threw it down, and for this act the action was brought. The recorder charged the jury, that from the *parol* admissions of the defendant, they might infer that the parties had always intended a straight line, and that the defendant might be considered as holding by sufferance, or permission, and that his possession was not adverse. This doctrine cannot be supported. The *parol* admission of the defendant was certainly not sufficient, *per se*, to change the possession. To give to a naked *parol* declaration, that the true line was a straight line, such an effect, after so long an acquiescence in a boundary line, would counteract the beneficial effects of the

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statute of frauds, and render the title to real property alarmingly insecure. The defendant's possession, for upwards of twenty-five years, was, of itself, an absolute title, and a bar to all the world. He had availed himself of the *locus penitentie*, and did not sanction the running of the boundary line, or the attempt to change the possession.

The judgment below must, therefore, be reversed.

Judgment reversed.

***MEGHAN against MILLS.**

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THIS was an action of *assumpsit*, brought on a note or *due bill*, in the following words: "Due Henry Meghan, one hundred and seventy dollars, value received. Albany, October 29, 1810, John Mills."

At the trial, the defendant gave in evidence a receipt, as follows: "Received, New-York, November 28, 1810, of John Mills, one hundred and seventy dollars, being the amount of a due bill, in the hands of Wm. Leonard, which I promise to destroy. Henry Meghan."

The plaintiff, in order to show an assignment of the due bill to Leonard, and notice thereof to the defendant, proved the endorsement of the plaintiff's name on the bill; and that in the spring of 1811, Leonard called on the defendant and demanded payment of the bill, and the defendant produced the above receipt; that in the conversation which then took place, the defendant admitted that Leonard had demanded payment of the bill, the preceding autumn, and the defendant did not pay it, as he had not the money, at that time; but told Leonard that he, the defendant, was going to New-York, the next week, in the steam boat, and would settle it there. It appeared that the plaintiff lived in New-York, and that Leonard was a steward on board of one of the steam boats.

The judge left it to the jury, whether there was sufficient evidence of a notice of an assignment to Leonard, and expressed his opinion, that it was enough to charge the defendant with notice. The jury found a verdict for the plaintiff.

A motion was made to set aside the verdict, and for a new trial.

Rodman, for the defendant.

Sedgwick, contra.

Per Curiam. Here was not evidence sufficient to charge the defendant with notice of the assignment of the note to Leonard, at the time that he paid the amount of it to the plaintiff. It was not a negotiable note, and there was no other evidence of the assignment of it, than the endorsement of the plaintiff's name in blank. This would be sufficient for negotiable paper, but as for specialties and other paper, not negotiable, it

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A. gave B. in New-York, a note or a due bill, in the following words: "Due to B. 170 dollars, value received." On which B. endorsed his name and delivered it to C. who, afterwards, demanded payment of the due bill from A. at Albany, who said he was going to New-York, the next week, and would settle it there; and A. afterwards paid the amount to B. in New-York, and took his receipt in full, the due bill being still in the hands of C.; C. afterwards brought a suit, in the name of B. against A. on the note; it was held that there was not sufficient notice of an assignment of the note; and that C. when he demanded payment, ought to have shown the note, with the endorsement to A. or

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explicitly stated that it had been assigned

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by B. and that
C was not en-
titled to recov-
er. (a)

is not conclusive of itself, though it may be presumptive evidence, that the property in the paper has been passed. But it does not appear that *Leonard* had even shown this endorsement to the defendant, before the payment, or given him any notice that he was proprietor of the note. All that he had done, was to call upon the defendant for payment, and this might as well have been in the character of agent or servant to the plaintiff, as of owner. The presumption is, that the defendant considered *Leonard* in that light, for he said he was going to *New-York*, the next week, in the same steam boat, and *would settle it there*. The settling of it *there*, would seem to refer to the plaintiff, as the person with whom he would settle, for the plaintiff lived there, and it does not appear where *Leonard* resided, but he was a steward on board of one of the steam boats.

The only additional fact from which to infer notice, was, that when the money was paid to the plaintiff in *New-York*, the note was still in the hands of *Leonard*. This payment was in *November*, and probably in the "next week" above referred to, and under the above circumstances, it was not enough to ground the inference. There ought to be something equivalent to a direct and positive notice of the assignment of the instrument, before the defendant is to be charged with a *fraudulent* payment to the plaintiff, for in no other point of view could the payment be questioned. If the plaintiff meant to give any thing more than a mere authority to *Leonard*, to receive the money, and had actually transferred to him his interest in the note, *Leonard* was guilty of great negligence, in not producing the note, and stating explicitly his interest, as owner, when he called upon the defendant for payment. The circumstances of the case are too loose and equivocal to justify the court in helping the *laches* of *Leonard*, by fixing the charge of fraud upon the defendant.

Motion for a new trial granted, with costs to abide the event of the suit.

(a) A special notice of the assignment of a chose in action need not be shown. It is enough if the party has such a knowledge of facts and circumstances as is sufficient to put him on inquiry. *Anderson v. Van Alen*, 12 Johns. Rep. 343.

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*BLANCHARD against COR. MYERS.

An execution was issued by a justice of the peace, within thirty days after the judgment, and the same was levied on the goods of the defendant, and the constable took security for their forthcoming, at a certain day; and, afterwards, be-

IN error from the Court of Common Pleas of *Greene* county. *Blanchard* brought an action of trespass on the case against *Myers*, in the court below. The declaration stated, that the plaintiff, being one of the constables of the town of *Cairo*, in the county of *Greene*, received from a justice of the peace, an execution against *Tobias Myers*, the 30th of *January*, 1811, by which he was commanded to levy the amount of the goods, &c. of *Tobias Myers*, and that he accordingly, by virtue of the execution, seized certain goods of *T. Myers*, on the same day; and that after the seizure, the defendant, in consideration of the plaintiff's delivering the same property

into the custody of the defendant, promised, by a certain engagement in writing, to deliver the said property, at the house of one R. B. on the 20th of *February*, then next; but that he did not deliver it on that day, or at any other time, wherefore, &c.

The defendant pleaded *non assumpsit*, with notice.

At the trial, the defendant offered to prove that a *certiorari* on the judgment before the justice, was regularly issued from this court, the 14th of *February*, 1811, and served on the justice the same day. The evidence was objected to; but admitted by the court.

It was admitted, that the plaintiff, in the suit before the justice, did not offer to give security to the justice, after the *certiorari* had been issued; and that the property was, at the time of the seizure, and ever since has been, in the possession of *Tobias Myers*, the defendant, against whom the execution was issued.

The court below charged the jury, that the *certiorari* was a stay of all proceedings from the time it was served, and that it excused the defendant, in not delivering the property pursuant to the receipt he had given. The jury accordingly found a verdict for the defendant. A bill of exceptions was tendered to the opinion of the court, on which a writ of error was brought to this court.

Powel, for the plaintiff in error.

E. Williams, contra.

**Per Curiam.* A *certiorari* allowed after execution begun to be executed by the constable, is no *supersedeas* to the execution. The same rule applies to cases arising under justices' judgments and executions, which exists as to other courts, when a regular writ of error is allowed; and it is well settled that the allowance of a writ of error, after the sheriff has levied under a *fi. fa.* is no *supersedeas* to it. (*Meriton v. Stevens*, *Willis's Rep.* 271.) Here the levy was made before the allowance of the *certiorari*, and the issuing the execution within the 30 days, and the constable taking security that the goods levied on should be forthcoming at a certain day, did not affect the application of the rule.

The decision of the court below was, consequently, erroneous, and the judgment must be reversed. Judgment reversed.

(a) *Acc. Kinnis v. Whitford*, 17 *Johns. Rep.* 34. But if bail in error is put in and perfected within the four days, though the plaintiff may take out execution, it is subjected to be arrested by the writ of error. The decision in *Blanchard* and *Myers* is therefore so far overruled. *Brisban v. Caines*, 11 *Johns. Rep.* 197. *Blunt v. Greenwood*, 1 *Cowen*, 21. *Jackson v. Eden*, 7 *Cowen*, 412. *Jackson v. Schaubert*, 7 *Cowen*, 417. 490. *People v. Judges N. Y. C. P.* 1 *Wendell*, 81, and note (a) to that case, where all the authorities are considered.

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fore the expiration of thirty days, and before the day fixed by the constable, a *certiorari* was regularly issued and served on the justice. It was held that a *certiorari* does not operate as a *supersedeas* or stay of proceedings, where the execution is levied before the allowance of such *certiorari*. (a)

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GLEN against HODGES.

THIS was an action of trespass *vi et armis*, for taking the plaintiff's negro man slave out of the plaintiff's possession, and carrying him away. The declaration alleged, that the defendant, on the 31st of *July*, 1810, with force and arms, at a place called *Rutland*, to wit, at *Albany*, in the county of *Albany*, seized,

A. the owner of a slave, in this state, went into the state of *Vermont*, to reclaim his slave, who had run away from the

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service of his master, and resided there as a freeman. A. having taken the slave, while he was in his possession, B. took out an attachment against the slave, [* 68]

for a debt, on which the slave was arrested by an officer, and forcibly taken out of the possession of his master, and imprisoned.

A. brought an action of trespass against B. in this state, for taking away his slave, and it was held, that under the law of the United States, A. had a right to reclaim the slave, as a fugitive from service, and that as the slave was incapable of contracting a debt, the attachment was illegal and void, and no justification to B. who was guilty of a trespass, for which an action would lie in the state. (a) For injuries to personal property, or personal rights, which are of a transitory nature, an action may be brought wherever the defendant is to be found. (b)

took, and carried away, a certain negro man slave, called *Harry*, the property of the plaintiff, of the value of 300 dollars, &c.

The defendant pleaded, 1. Not guilty; 2. That the negro man lived in *Rutland* in the state of *Vermont*, four years preceding the supposed trespass, and was, by the people of that place, reputed and considered a freeman; and that the defendant, and his partner in trade sold the said negro man goods on credit, for which he became indebted to them; and that, before the supposed trespass, they took out an attachment against the said negro for the said debt, which attachment was duly issued by a justice of the peace for *Rutland*, and delivered to a constable of the same place, to be served and returned, and that by virtue of the said writ of attachment, the constable arrested the negro, and committed *him to the gaol of *Rutland* county, according to the exigency of the said writ; which arrest, taking, and imprisonment of the said negro, is the same trespass alleged in the plaintiff's declaration, &c. To the second plea, the plaintiff replied, that before the taking and arresting the said negro, by virtue of such writ of attachment, the defendant had notice that the said negro was the slave of the plaintiff, &c.

The cause was tried at the *Albany* circuit, in *October*, 1811, before Mr. Justice *Van Ness*.

The plaintiff proved that, in *February*, 1808, he bought of one *Deoffendorf*, a negro man, named *Harry*, who, at the time of such purchase, was a runaway, and had been gone about two years. *Deoffendorf* went with the son of the plaintiff, who had a power from his father, to take the negro in the state of *Vermont*, and they found him in *Rutland*. The negro was taken by *Jacob S. Glen*, in behalf of his father, the plaintiff; and while the negro was in the custody of the plaintiff's son, a constable came and arrested him, by virtue of a writ of attachment, at the suit of the defendant and his partner. The son of the plaintiff claimed the negro as a slave; but the constable took him by force, carried him away, and committed him to the gaol of the county.

It was proved, that the day before the negro was taken out of the possession of the son of the plaintiff, the defendant knew that he was going away, and took out the writ of attachment in consequence; that the negro had resided in *Vermont* since 1805, and, for some months preceding, had lived near the defendant.

The plaintiff gave in evidence the bill of sale of the slave to him from *Deoffendorf*, and also a power of attorney to his son, to take the slave.

The defendant gave in evidence a copy of the writ of attachment and return thereon, and of a record of a judgment recovered in pursuance thereof against the negro *Harry*, in

(a) At common law a slave was incapable of entering into any civil contract, and it is only by statute that he is enabled to contract matrimony or take lands by descent or purchase. Vide *Overseers of Marbletown v. Overseers of Kingston*, 20 Johns. Rep. 1 *Jackson v. Leroy*, 5 Cowen, 397.

(b) Vide *Gardiner v. Thomas*, 14 Johns. Rep. 134. *Flower v. Allen*, 5 Cowen, 654.

favor of the defendant and his partner, for thirteen dollars and thirty-seven cents, the 21st *July*, 1810, before a justice of the peace, which were admitted by the plaintiff to be authentic evidence of the proceedings mentioned in them.

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When the agent of *Glen* first took the slave, he said it was for *theft*; but, as soon as he had him secured, he declared that he had taken him as a *slave*; and held him as such, until he was taken away by the constable.

*It was admitted, that by the constitution and laws of *Vermont*, slavery was wholly prohibited. (a)

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The judge declared his opinion on the law and the evidence, that the plaintiff was not entitled to recover, and the plaintiff submitted to a nonsuit, with liberty to move the court to set it aside, and to grant a new trial.

Paine, for the plaintiff.

Van Vechten, contra.

Per Curiam. There is no doubt that the negro was the property of the plaintiff, and had run away from service into *Vermont*. He was held to service or labor under the laws of this state, when he escaped, and the escape did not discharge him, but the master was entitled to reclaim him in the state to which he had fled. This is according to a provision in the constitution of the *United States*, (art. 4. s. 2,) and the act of congress of the 12th of *February*, 1793, (*Laws United States*, vol. 2. 165,) prescribes the mode of reclaiming the slave. It not only gives a penalty against any person who shall knowingly and willingly obstruct the claimant in the act of reclaiming the fugitive; but saves to such claimant "his right of action for any injury" he may receive by such obstruction. The plaintiff was, therefore, in the exercise of a right when he proceeded to reclaim the slave, and the single question is, whether the defendant is not responsible in trespass, for rescuing the slave, though he did it under the form and color of an attachment for a debt alleged to have been contracted with him by the slave. The negro, being a slave, was incapable of contracting, so as to impair the right of his master to reclaim him. A contrary doctrine would be intolerable, so far as respects the security of the owner's right, and would go to defeat the provision altogether. The defendant, therefore, contracted with the negro, and sued out the attachment, at his peril. It was a fraud upon the master's right. The fact being established that the negro was a fugitive slave, the attachment was no justification to the party who caused it to be *sued out. This must have been so adjudged, if the point had been raised in *Vermont*, because the entering into

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(a) The first article of the *Declaration of Rights*, prefixed to the Constitution of *Vermont*, adopted the 9th of *July*, 1793, declares that "no male person born in this country, or brought over from sea, ought to be holden, by law, to serve any person as a servant, slave, or apprentice, after he arrives to the age of twenty-one years; nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent," &c.

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a contract with such slave, and the endeavor to hold him under that contract, contravened the law of the *United States*, which protects the master or owner of fugitive slaves in all his rights, as such owner. If the slave had committed any public offence in *Vermont*, and had been detained under the authority of the government of that state, the case would have been different, and the right of the master must have yielded to a paramount right. But the interference of any private individual, by suing out process, or otherwise, under the pretence of a debt contracted by the negro, was an act illegal and void.

There can be no objection to an action of trespass being brought here, though the act happened out of the state. The injury concerned the rights of personal property. The act was not a public offence, nor did it touch the rights of real property. It was of a transitory nature; and it is an established principle that such personal actions may be laid where the defendant is to be found — *sequuntur forum rei*. This was the doctrine in the cases of *Mostyn v. Fabrigas*, (*Cowp.* 161,) and of *Rafael v. Verelst*, (*2 Black. Rep.* 1055.)

A new trial is, therefore, awarded, with costs to abide the event.

Motion granted.

THE PEOPLE *against* JACOB TOMPKINS.

Lying in wait near a gaol, by agreement with a prisoner, and carrying him away, is not an offence against the statute, (*sess.* 24. c. 53. s. 12, 13,) but is a misdemeanor at common law.

THE defendant was indicted, at the General Sessions of the Peace, in the county of *Cayuga*, under the act (*sess.* 24. c. 58. [*2 R. S.* 683. sec. 13. et seq]) concerning crimes, &c. for aiding and assisting one *Abigail Tompkins*, then in custody on a charge of felony, to escape. The indictment charged that the defendant did “unlawfully and knowingly contrive and conspire with the said *Abigail Tompkins*, and near the said gaol did *lie in wait*, to the intent and purpose that the said *Abigail Tompkins* might *thereby be enabled to escape*; and that pursuant to the contrivance and conspiracy of the defendant with the said *Abigail Tompkins*, and by *his means and procurement*, she did escape and go at large from the said gaol, and so the defendant did convey the said *A. T.* away and assist her in escaping from the said gaol,” &c.

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**Per Curiam*. The gist of the offence here charged is *lying in wait* near the gaol, by agreement with the prisoner, and conveying her away. But the statute offence is “aiding or assisting any person in gaol, in escaping or attempting to escape from such gaol, though no escape be made.” The assistance must appear to have been rendered towards escaping from within the gaol, and not merely in assisting the person, who had got without the gaol, to elude pursuit. If this is not the construction of the statute, then lying in wait, ten or

twenty miles from the gaol, to receive the person and carry him further off, would come within the statute. The offence is much more dangerous, and requires a more hardy and deliberate purpose, to assist a prisoner who is within a gaol, in escaping from the gaol, than to assist a prisoner who is without, to escape pursuit. The latter is a *misdemeanor* at common law; but the offence within the statute is punished with an increased severity, and is not to be extended by equity. The following provision in the same section shows that the offence, in all its branches, is confined to cases of assistance rendered to prisoners *in actual confinement*, and to enable them to escape from such confinement. The subsequent part of the section is, "or of conveying any disguise, instrument or arms into any gaol, to and for the use of any such prisoner, so committed or detained, with intention to facilitate his escape," &c.

The court are, therefore, of opinion, that the offence charged is not within the act, and that the judgment must be reversed.

N. B. The same judgment was given in the case of *The People v. Steel*, indicted for a similar offence.

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THE PEOPLE *against* GASHERIE, EXECUTRIX, AND OTHERS.

THIS was an action brought against the executors of *Joseph Gasherie*, one of the loan officers of *Ulster* county, for retaining and converting to his own use, divers sums of money, which he had received as loan officer, while in office.

A verdict was found for the plaintiff, for the amount of the several sums of money so retained and *converted* by the testator, in his life-time, and for the *interest* thereon from the times when the same ought respectively to have been paid into the treasury.

Interest is recoverable against a person intrusted with the collection of money, who retains and converts it to his own use, from the time when the same ought to have been paid over. (a)

The only question submitted to the decision of the court was, whether the *interest* ought to have been allowed.

**Per Curiam.* The late *English* decisions do not always allow interest on liquidated sums; and Lord *Ellenborough* refused it, even when the defendant had obtained the possession of the plaintiff's money by fraud. (1 *Campb.* 129. 2 *Campb.* 426.) This is going further than we are inclined to go. If the defendant retains and converts the plaintiff's money to his own use, he ought to pay interest. It is allowable in actions for money had and received. (*Pease v. Barber*, 3 *Caines*, 266.) In *trover* for money in a bag, or for a specific chattel, the jury may, and, in many cases ought to, allow interest for the detention, by way of damages. (3 *Burr.* 1364. 1 *Bay's S. C. Rep.* 273, 274. 2 *Johns. Rep.* 282.) It is agreeable to the principle of these decisions, and it is just and reasonable in itself, that the defendant who retains and

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(a) The principles connected with this branch of the law are examined much at large in the case of *Reid v. The Rensselaer Glass Factory*, 3 *Cowen*, 393. 5 *Cowen*, 587

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converts the money of another to his own use, should pay interest for that use. Interest ought, therefore, to be allowed in the present case. Judgment for the plaintiff.

N. B. In the cases of *The People v. Gasherie and others, devisees of Gasherie*, and *The People v. Colden and others*, interest was also allowed.

THE PEOPLE *against* STEVENS, SHERIFF, &c.

Where a declaration is filed *in chief*, after receiving notice of special bail, it is a waiver of any exception to the sufficiency of the bail, though the bail-piece was not actually filed in the clerk's office, at the time the notice was given; and the plaintiff cannot, on the ground of the insufficiency of the bail, proceed against the sheriff.

THE defendant was brought up by an attachment issued against him, for not bringing in the body of *David Richardson*, at the suit of *Rufus Backus*, pursuant to a rule of the court for that purpose.

It appeared that the *capias ad respondendum* was returned by the defendant endorsed *cepi corpus*, at the *August* term, 1801. Three persons became special bail for the defendant in that suit, of which notice was given to the plaintiff's attorney. After receiving notice of bail, the plaintiff's attorney filed a declaration *in chief*. The bail-piece was not, in fact, filed at the time the notice was given; but was, afterwards, filed in the clerk's office, when the plaintiff's attorney entered an exception on the bail-piece; and afterwards, in *June*, 1811, proceeded to rule the sheriff to bring in the body of the defendant.

Crary, for the defendant.

J. Russel, contra.

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**Per Curiam*. By filing a declaration *in chief*, after receiving notice of the bail, the plaintiff's attorney waived his exception to the sufficiency of the bail, and it made no difference, that the bail-piece was not, at the time, actually filed. That omission could not prejudice the plaintiff, as the court, upon application, would have compelled the defendant's attorney to have filed the bail-piece, *nunc pro tunc*. The sheriff should have shown this matter, upon the rule to show cause. As he omitted to do it, he must pay the costs of the attachment, and will then be entitled to be discharged. This ground for the discharge being sufficient, it becomes unnecessary to inquire whether the plaintiff's delay, for more than nine months, to call on him for bail, was not also sufficient to discharge him, according to the doctrine in the cases of *The King v. Sheriff of Surry*, (7 Term Rep. 452,) and of *The King v. Perring*. (3 Bos. & Pull. 151.)

J. E. HORNBECK *against* WESTBROOK.THE SAME *against* THE SAME.THE SAME *against* THE SAME.ALBANY,
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IN error, on *certiorari*, from a justice's court. The return in the first cause, stated that the parties voluntarily appeared before the justice, and *Westbrook*, the defendant in error, declared against *Hornbeck*, the plaintiff in error, in an action of trespass *quare clausum fregit*; and for cutting wood, &c. the 1st of *April*, 1810, on a certain tract of land, which *Jacob De Witt* and others, trustees of the town of *Rochester*, by virtue of the patent to them, by deed, on the 6th of *January*, 1728, conveyed in fee to *Cornelius Hornbeck*, for a valuable consideration. The defendant pleaded and justified the trespass, because the deed contained a *proviso*, that the inhabitants of *Rochester* should be allowed to cut and carry away wood, &c. from any part of the said land, not in fence, and that he was, and had been, from the 1st of *January*, 1800, an inhabitant of *Rochester*, and, by virtue of the said *proviso*, he entered and cut the wood, &c. and that the *locus in quo* was not in fence, &c. To this plea there was a general demurrer and joinder, on which the justice gave judgment for the plaintiff for three dollars.

*In the *second* cause, the return also stated that the parties voluntarily appeared before the justice, and *Westbrook* declared against *Hornbeck*, in an action of trespass *quare clausum fregit*, and for cutting and carrying away wood, &c. on the 2d of *April*, 1810, as in the first cause; to which the defendant put in the same plea; and the plaintiff demurred, and for cause, stated that the *proviso* in the deed was limited to such persons as were inhabitants of *Rochester*, on the 6th of *January*, 1728, and that they were allowed to cut wood, &c. for their own use only. There was a joinder in demurrer; on which the justice gave judgment for the plaintiff for three dollars.

In the *third* cause, the return stated the same proceedings as in the last cause, except the trespass was laid on the 3d of *April*, 1810, and the defendant in his plea, alleged that the *locus in quo* was enclosed only by a *bush* fence, and not by any fence for useful or agricultural purposes; and the plaintiff in his replication, stated that ever since the date of the patent to the trustees of the town of *Rochester*, the trustees had been in the practice of selling the common lands, by deeds with such *provisoes*; and that in consequence of such *provisoes*, it had been a prevalent custom in the town, and universally adopted by the proprietors of the lands, under such deeds, to enclose them with such a fence, for the purpose of excluding them from the operation of the reservation; and that the de-

The inhabitants of a town, not being incorporated, are incapable in law, to take any estate in fee. And a *proviso* in a deed to *A.* dated in 1728, reserving to the inhabitants of the town of *Rochester*, which was not incorporated, the right to cut wood on the lands conveyed, when not in fence, &c. was held to be void. If operative, it would only give the right to the inhabitants of the town, living at

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the time of the grant, as the *proviso* contained no words of perpetuity.
(a)

(a) Vide *Jackson v. Cory*, 8 Johns. Rep. 385. *Jackson v. Hartwell*, Id. 422. *North Hempstead v. Hempstead*, *Wendell*, 100

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fendant knew of such a custom, and that the premises were so enclosed. The defendant rejoined and admitted the *custom*, and that the *locus in quo* was enclosed with such customary fence, but that the fence was insufficient, and the custom invalid, &c. The plaintiff demurred, and the defendant joined in demurrer. The justice gave judgment for the plaintiff for three dollars.

Per Curiam. The *proviso* in the deed of 1728 was null and void. The inhabitants of the town of *Rochester* were not incorporated, so as to be competent to take an estate in fee. A grant to them would have been void for uncertainty, in like manner as a grant would be void to the churchwardens of a parish, or to the inhabitants of *Dale*, or to the commoners of such a waste. (*Shep. Touch.* 236. *Co. Litt.* 3, a.) It was decided, at the last term, that a grant to the people of the county of *Otsego* was void, for the same reason. (*Jackson, ex dem Cooper, &c. v. Cory*, 8 *Johns. Rep.* 385.) The grantors in the deed of 1728, were seised in fee, as private individuals, and were competent to convey in fee, the common lands of the town of *Rochester*. This was so settled in the *case of *Jackson v. Schoonmaker*. (2 *Johns. Rep.* 230.) And if the inhabitants were incompetent to take an estate at law, by that name, a reservation to them, in a deed in fee to a third person, would be equally void. But such a covenant or reservation to any third person would be void. A person who is not a party to a deed, cannot take any thing by it, unless it be by way of remainder. The grantor cannot covenant with a stranger to the deed. This is an acknowledged rule of law. (*Salter v. Kidgley, Carth.* 76.) In *Whitlock's Case*, (8 *Co.* 69,) it was admitted, that a reservation in a deed to a stranger was void. If this proviso had any legal operation, it could not have vested a right in any other persons than those who were at the time of making the deed inhabitants of *Rochester*. There were no words of perpetuity, and the inhabitants were not an incorporated body, so as to be enabled to transmit a privilege to their successors. If it was any thing, it was a personal privilege, and confined to the then existing inhabitants.

The right claimed by the defendant below is, then, in every point of view, absolutely groundless, and the judgment in each case ought to be affirmed

Judgment affirmed.

BROWN against HINCHMAN.

Under the 4th section of the act (sess. 31. c. 204,) "for the recovery of debts to the value of 25 dol-

IN error, on *certiorari*, from a justice's court. *Brown* sued *Hinchman*, before a justice, by warrant, which was obtained on the oath of *Brown*, which *satisfied* the justice as to the propriety of issuing the warrant. The plaintiff declared on a promissory note. The defendant objected to the process

which had been issued against him, and made oath that he was a freeholder within the county. The plaintiff was nonsuited on the ground that being a resident within the county, he could not, in any case, sue a *freeholder* of the county, by warrant.

Per Curiam. The warrant was obtained by virtue of the plaintiff's oath; and the act (*sess.* 31, c. 204, s. 4. [2 R. S. 228, 229, s. 17. 19,]) says, that if the plaintiff "shall prove to the satisfaction of any justice, that the defendant is about to depart," &c. he may have a warrant, though the defendant be a freeholder or inhabitant, having a family. *Proof* here, means legal evidence; and that cannot be the party's own oath, unless the statute expressly says so. Whenever the statute, as it does in several other places, admits proof by the party's own oath, the language of it is explicit; and the former *ten pound act* of 1801, relative to this point, said that the plaintiff should "prove, *upon oath*, to the satisfaction of the justice, that he was in danger of losing his debt, or *really believed so*," &c. All these emphatic words, which show that the party's own oath was intended, are omitted in the new act. Probably, the right had been abused, and the legislature considered it dangerous to allow an interested, or prejudiced person, or angry plaintiff, to sue out a warrant against any freeholder or inhabitant with a family, on his own oath. The temptation might be too strong to vex and oppress. The plaintiff was, therefore, properly nonsuited, though not for the reason assigned by the justice. Judgment affirmed.

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lars," a justice cannot issue a warrant against a freeholder or per-

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son having a family, on the oath of the plaintiff; but the proof of the defendant's being about to depart, or of the danger of losing the debt, must be by other and legal evidence.(a)

(a) *Contra*, *Terry v. Fargo*, 10 *Johns. Rep.* 114. So under the Revised Statutes, the affidavit of the party will be deemed sufficient on application for a warrant. *Bissell v. Hills*, 3 *Wendell*, 369. And under the Justices' Act of 1824 a similar construction prevailed. *Id.*

N. & G. GRISWOLD *against* THE MASTER AND WARDENS OF THE PORT OF NEW-YORK.

IN error, on *certiorari*, from the Justice's Court in the city of *New-York*. The master and wardens of the port of *New-York*, brought an action of debt against *W. & G. Griswold*, on the sixteenth section of the "act to establish a board of wardens in the port of *New-York*, and for the regulation of the pilots and pilotage in the said port," passed the 9th of *April*, 1811, (*sess.* 34, c. 198,) which declared, "That the master, or one of the owners or consignees of every vessel employed in the coasting trade, and being of the burden of fifty tons, or upwards, which shall arrive at the port of *New-York*, by the way of *Sandy-Hook*, and every vessel, *other than vessels employed in the coasting trade*, arriving at the said port of *New-York*, either by the way of *Sandy Hook*, or through the *Sound*, shall report such vessel at the office of the board

A vessel above 50 tons, coming from *Connecticut* through the *Sound* to the port of *New-York*, though a registered vessel, and not having a coasting license, yet if actually employed in the coasting trade, is not liable to the penalty given by the 16th section of the act (*sess.* 34. c. 198,) relative to

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the wardens of
the port of
New-York, for
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not being re-
ported to the
office of the
wardens, with-
in 48 hours af-
ter her arrival.

of wardens, within forty-eight hours after the arrival of such vessel at the port of *New-York*, under the penalty of fifty dollars for each neglect," &c. It appeared, that the ship *Emulation*, of the burden of three hundred and thirty tons, arrived at the port of *New-York*, through the *Sound*, on the 11th of *June*, 1811, consigned to the plaintiffs in error. She was a *registered* vessel, without a coasting license; and had never been on any voyage out of the *United States*, being *a new vessel lately built in *Connecticut*, and loaded with wood taken on board at *Haddam*, in *Connecticut*, intended for sale, and sold in *New-York*, and this was her first voyage.

Neither the master, owners, nor consignees, made any report of the vessel within forty-eight hours after her arrival in the port of *New-York*, to the office of the wardens of the port. The court below gave judgment for the plaintiffs below, for fifty dollars.

The case was submitted to the court without argument.

Per Curiam. The single point submitted in this case is, whether a vessel which is, in fact, employed in the coasting trade, and arrives at the port of *New-York*, through the *Sound*, must be reported to the office of the board of *wardens*, under the sixteenth section of the act of the 9th of *April*, 1811, though she has no coasting license. The act gives a penalty of fifty dollars, for every neglect or omission to report; but it does not define, as is done by the act of congress of the 18th of *February*, 1793, (*Laws United States*, vol. 2. p. 168. *Cong. 2. sess. 2. c. 8.*) what shall be the requisite evidence of a coasting vessel. The act of the legislature was passed for local and municipal purposes, and it was not essential, though it might be convenient, to have required the same test of the character of the vessel which was established by the laws of the *United States*. The second section in the act giving the penalty, is to be taken strictly; and if the vessel be, in fact, as was the case here, employed in the coasting trade, through the *Sound*, she comes within the letter of the exemption from the penalty, and it cannot be exacted.

Judgment reversed

JACKSON, *ex dem.* HORTON AND OTHERS, *against* ROE.

Where a
plaintiff was
nonsuited at
the trial, the
court refused to
set aside the
nonsuit, and
grant a new
trial, on the
ground that the
plaintiff was
surprised by

A MOTION was made, on the part of the plaintiff, to set aside the nonsuit granted at the trial of this cause, and for a new trial.

The affidavit of *Horton* was read in support of the motion, that one of the lessors, and four others, of whom the defendant was one, purchased a lot of land of *T. Colden*, which was surveyed and subdivided into five lots. A deed was given by *Colden* to the lessor for the whole lot, who conveyed to the

others the subdivided *lots. The defendant took possession of his lot, and moved his fence, so as to encroach on the lot of the lessor. At the trial the defendant denied the title of *Colden*, and the plaintiff, not being prepared to prove it, was nonsuited. It was further stated, that the lessor not having any idea of any other question to be made, at the trial, than the right of the defendant to move the fence, was *surprised* by the defence which was set up.

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the defence set
up, and had
come unpre-
pared to meet
it.

Per Curiam. It is a well settled rule, that a new trial will not be granted, because the party came to trial unprepared, and this rule applies with at least as much force to the plaintiff as to the defendant. In *Cook v. Berry*, (1 *Wils.* 98,) the plaintiff did not come prepared to meet the defendant's plea, because he took it to be a sham plea, as he had a letter under the defendant's hand acknowledging the debt, but that letter he was not prepared to prove, and the defendant had a verdict, and on motion for a new trial, it was denied. That was a much harder case than this, for there the plaintiff lost his debt for ever, but here he was only nonsuited; and whether he was nonsuited, or had a verdict against him, he is equally at liberty to bring a new suit, and is only punished in costs, for his neglect or carelessness. The general rule is too well established to be questioned, and too useful to admit of innovation. (2 *Salk.* 653. 2 *Johns. Cases*, 319. 2 *Binney*, 583.)

Motion denied.

KILLPATRICK *against* ROSE.

A MOTION was made, on the part of the defendant, to vacate the judgment entered in this cause, at the last *August* term. The judgment was given on the return to a *certiorari*, from a justice's court, which stated, that the plaintiff below claimed of the defendant two hundred and fifty pounds of butter. In support of the motion, the affidavit of the justice was read, stating that the demand of the plaintiff, before, was in fact for three hundred and fifty pounds of butter, and that the return was incorrect, the clerk, in copying it, having inserted two hundred and fifty, instead of three hundred and fifty pounds.

After argu-
ment of a
cause, and a
judgment
therein, and
the term ended,
it is too late to
move to amend
the record.
(a)

The judgment below was reversed on the ground, that the jury had found a verdict for the plaintiff for thirteen dollars more than he claimed. The original return, on which the case in error was argued, stated the demand to be for two hundred and fifty pounds only.

**Per Curiam.* • After argument and judgment, and the term ended, a party comes too late to move to have the record amended, and to open the cause. If the argument had been founded upon an erroneous copy of the return, the case

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(a) *Acc. Cur-
rie v. Henry*, 3
Johns. Rep
140.

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v.
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would have been different; but here the original return stated that the demand was only for two hundred and fifty pounds of butter. It would be productive of great inconvenience to allow the losing party to resort to the justice to amend his return, after argument upon the return as made, and judgment given and perfected.

Motion denied.

VANDERHEYDEN *against* GARDENIER.

If a plaintiff who sues out a *scire facias*, to revive a judgment, does not proceed upon it, within a year and a day, it is a discontinuance; and where after *scire facias* returned a default was entered for want of not appearing and pleading, and the plaintiff suffered more than a year and a day to elapse, before he entered judgment, it was held to be a discontinuance, and the judgment irregular.

A MOTION was made, by the defendant, to set aside a judgment on a *scire facias*, and all subsequent proceedings, for irregularity.

The original judgment was docketed the 31st of *December*, 1805, and the defendant's attorney could find no evidence of the proceedings on *scire facias* to revive the judgment, except the docket of the judgment on *scire facias* on the 31st of *August*, 1811. The plaintiff, however, proved that a writ of *scire facias*, with the return of *scire feci* endorsed by the sheriff, returnable in *November* sessions, 1808, was on file in the clerk's office, and that on the 19th of *December*, 1808, the common rules were entered on this return, and a default for not appearing and pleading was entered on the 13th of *January*, 1809; but final judgment on the *scire facias* was not entered until the 13th of *May*, 1811.

Per Curiam. If the plaintiff who sues out a *scire facias* to revive a judgment, does not proceed upon it within a year and a day, it is a *discontinuance* of it, and the plaintiff must commence by *scire facias de novo*. So, if he does not sue out execution on a judgment on *scire facias* within a year, he must revive it again. (*Impey's K. B.* 314. *Kidd's K. B.* 1009.) This cause comes within the rule; for between the entry of the default, and the entry of the judgment, there was an interval of two years and five months. This amounted to a discontinuance of the proceedings, and the subsequent entry of the judgment was irregular.

Motion granted.

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*FRASIER, JUN. *against* FRASIER.

This court exercise an equitable jurisdiction over judgments entered upon bonds and warrants of attorney; and on the application of a creditor, stating that a judgment had

I. H. TIFFANY, in behalf of a creditor, moved to set aside the judgment which had been entered up in this cause, by warrant of attorney, on the ground of fraud. It appeared that the plaintiff, who was the son of the defendant, was an infant when the bond and warrant of attorney were given to him, and had always lived on the farm with his father; and that an execution had been issued on the judgment, and the farm advertised for sale.

Parker, contra, read the affidavit of the plaintiff, denying the charge of fraud, and stating, that the bond was given for work and services performed, and money paid for the defendant.

Per Curiam. We have an equitable jurisdiction over judgments entered up by confession on bonds and warrants of attorney. The proper course is to direct an issue to try the charge of fraud. Let an issue, therefore, be made up between the parties, under the direction of one of the justices of this court, in such manner that the plaintiff be bound, on the trial of the issue, to set forth and prove the matters and consideration for which the bond was given by the defendant; and that the issue be tried at the next *Schoharie* circuit and that *T. G.* the creditor, in whose behalf the application is made, be permitted to *subpoena* witnesses to attend such trial, in the name of the defendant; and that all further proceedings on the said judgment and execution be stayed, until the further order of this court.

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v.

BATES.

been fraudulently entered up on a bond and warrant of attorney, an issue was directed between the parties to try the truth of the allegation, and the plaintiff directed to prove the consideration of the bond; and the creditor allowed to *subpoena* witnesses in the

name of the defendant, to attend the trial.(a)

(a) But the court will not interfere in behalf of a creditor at large. *Wintringham v. Wintringham*, 20 Johns. Rep. 296.

HASWELL, ASSIGNEE, &c. against BATES & LANSING.

ROSS moved to set aside the suit on the bail-bond in this cause, and all subsequent proceedings. The action was on a bail-bond, taken in the Court of Common Pleas of *Saratoga*, and both the bail *and the defendant lived out of the county. He cited 3 *Wilson*, 348. 3 *Burr*. 1923. 8 *Term Rep.* 152. 1 *Burr*. 642.

Druke, contra, cited *Davis v. Gillet*, (7 *Johns. Rep.* 318.)

Per Curiam. The suit is maintainable in this court, within the reason of the case of *Davis v. Gillet*; and the bail will be relieved on the usual terms. It is the uniform and established practice of the court, in every case, where the bail asks for relief, on the return of the writ against them, to grant it on the usual terms. There is no difference in this respect between a suit on a bail-bond and on a recognisance. The bail, in this case, are to pay only such costs as would be taxed in the Court of Common Pleas, as he is entitled to be relieved in the same manner as he would have been if this suit had been brought in this court.

Motion granted.

will always be relieved on the return of the writ against them, upon the

Where a bail-bond is taken in a court of common pleas,

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and the bail reside out of the county, an action may be maintained by the assignee of such bond in this court, who will grant relief to the bail on the same terms as if the bond had been taken in this court. The bail is bound to pay common pleas costs only. Bail to the sheriff as well as special bail, usual terms.(a)

(a) See *Bulkley v. Colton*, 1 *Johns. Rep.* 515. *Gardiner v. Busham*, 12 *Johns. Rep.* 459. *Burtus v. McCarly*, 13 *Johns. Rep.* 494.

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v.

WOODS.

Where no venue is laid in the body of the declaration, the venue in the margin is sufficient.

SLATE *against* Post.

THE declaration, in this case, contained two counts; one on a promissory note, and the other for money lent, &c. There was a demurrer to the second count. There was no venue or place laid or mentioned in the body of the declaration, except in the margin of the first count.

Per Curiam. Where no venue is laid in the body of the declaration, reference must be made to the venue in the margin, and that is sufficient. (*Barnes*, 483. 3 *Term Rep.* 387. *Tidd's K. B. Pr.* 375. 3 *Wils.* 339. 1 *Chitty's Plead.* 279.) The plaintiff is entitled to judgment.

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*PAGE *against* WOODS, SHERIFF.

In an action of debt against a sheriff for the escape of a prisoner in his custody on execution, the plaintiff in his declaration alleged a judgment recovered in the Court of Common Pleas of the term of August, 1807, held at Salem, in the county of Washington, &c. and in the record of the judgment produced at the trial, the place or town where the court was held, was not mentioned; it was held that the variance was immaterial. (a)

IN error, from the Court of Common Pleas of *Washington* county. The plaintiff brought an action of debt against the defendant, in the court below, for the escape of one *D. Powers*, who was taken in execution, at the suit of the plaintiff. The declaration stated, that the plaintiff recovered against *D. P.* "in the term of *August*, in the year 1807, in the Court of Common Pleas, held at the court-house, in the town of *Salem*, in the county of *Washington*, before the judges and assistant justices of the same court," &c.

At the trial, the plaintiff produced in evidence the record of a judgment against *Powers*, which had the usual caption; but the form of the entry of the judgment was as follows: "And now, at this day, to wit, on the last *Tuesday* of *August*, in the year of our Lord, 1807, until which day, &c. at which day before the judges and assistant justices aforesaid, the said *C. Page*, by his attorney, &c. and the said *D. Powers*, though solemnly called, came not, but made default, &c. therefore it is considered by the said court, before the judges and assistant justices aforesaid, that the said *C. Page* recover," &c.

The defendant's counsel objected, that the record produced did not support the allegation in the plaintiff's declaration; and the objection being allowed, the plaintiff was nonsuited.

Skinner, for the plaintiff in error, contended that the variance was immaterial, and cited 8 *Johns. Rep.* 455. 1 *Wils Rep.* 155. 2 *Saund.* 101. 5 *Johns. Rep.* 98.

Crary, contra, insisted that the averment was material; and even if it was not material, that having been made, it ought to have been proved, and that the variance was therefore fatal. He cited 2 *Wm. Bl.* 1001. 3 *Bos. & Pull.* 456. 2 *East.* 452.

Per Curiam. The variance was immaterial. No other

(a) Vide *Jones v. Cook*, 1 *Cowen*, 309.

place than *Salem* is mentioned in the record. The place of holding the court is fixed by public statute, and it must be known to have been at *Salem*. The judgment ought to be reversed.

Judgment of reversal. (a)

(a) VAN NESS, J. was absent, from indisposition.

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JACKSON
v.
HOGEBROOM.

*JACKSON, EX DEM. RENSSELAER AND OTHERS, against
T. HOGEBROOM.

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SAME against J. HOGEBROOM.

E. WILLIAMS, for the plaintiff, moved for a rule to authorize the lessor of the plaintiff to make a *survey* of the farms of the defendants, comprising land included in a lease from the ancestors of the lessors, to the ancestor of the defendants. He read an affidavit of one of the lessors, stating that before the last Circuit Court, in *Columbia*, he applied to the defendants for permission to make the survey, in order to ascertain the quantities of land in the possession of the defendants, not included in the lease, but the defendants forbade the survey, and refused to permit the lessor or a surveyor to enter on the land; and one of them threatened violence, if any attempt should be made to enter; that a survey was made in the highway, and on the adjacent land; but the counsel for the lessors were of opinion, that a satisfactory location of the land comprised in the lease could not be made, without going upon the land, and that for that reason the plaintiff did not proceed to trial at the last circuit.

In an action of ejectment the court have no power to compel the defendant to consent to a *survey* of the premises in his possession.

Van Buren, contra, read an affidavit of one of the defendants, denying the charge of any offer of violence, and stating that he did not procure the other defendant to threaten any violence; that the cause was noticed for trial at the last circuit in *Columbia*; and not being brought on to trial, pursuant to such notice, he moved for judgment as in case of nonsuit.

Williams opposed the motion for a nonsuit, on the ground stated in the affidavit read in support of the motion for an order for a survey.

Per Curiam. We have no power to compel the defendants to consent to a *survey* of their farms. The motion of the plaintiff must, therefore be denied. We will not, however, compel the plaintiff to enter into the usual stipulation: but, inasmuch as it does not appear, but that the notice for trial might have been countermanded, when it was discovered that the survey was insufficient, the plaintiff must pay the costs of the last circuit.

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BROWN
v.
SMITH.

A *scire facias* cannot be issued to revive a judgment of more than *ten years'* standing, without a previous *affidavit* of the judgment's being unsatisfied. (a)

And after a *scire facias* was issued and returned *scire feci*, without such *affidavit*, the court refused to allow it to be filed *nunc pro tunc*; but quashed the *scire facias*.

*LANSING against LYONS.

A JUDGMENT was entered up in this cause, in *December*, 1798, by virtue of a warrant of attorney. An execution was issued on which nothing was done; and in *March*, 1799, the defendant paid twenty-six dollars and sixty-two cents to the plaintiff, leaving the residue unpaid. In *October*, 1811, the plaintiff sued out a *scire facias* to revive the judgment, returnable the 17th *August* last, which was duly served, and returned *scire feci*, by the sheriff. The defendant afterwards admitted there was a balance due on the judgment which remained unsatisfied.

Van Vechten, for the plaintiff, now moved for leave to file an affidavit, containing the facts above stated, *nunc pro tunc*, as of *August term* last, or that the plaintiff have leave to issue an *alias si. fa.* on the judgment, without reviving the same by *scire facias*.

R. M. Livingston, contra, objected that the judgment being of more than *ten years'* standing, the *scire facias* could not issue with an *affidavit* previously filed, that the judgment remained unsatisfied, and that the proceedings were, therefore, irregular. (*Tidd's K. B. Pr.* 1007.)

Per Curiam. The *scire facias* must be quashed for irregularity. But the plaintiff may, on paying the costs and filing the *affidavit* which has been read, take out a new *scire facias*, without further notice to the court.

(a) Acc. *Bank of New-York v. Eden*, 17 *Johns. Rep.* 105. Where the judgment is above twenty years' standing, the court have a discretion to grant or refuse a *scire facias*. Id.

BROWN against SMITH.

Bail have eight entire days in full term, after the return of process against them, within which to surrender their principal; but *Sunday* is to be reckoned one of the eight days. (a)

ON a motion for an *exoneretur* of the bail, in this case, the only question was, whether *Sunday* was to be computed as one of the eight days within which the bail were allowed to surrender.

Foot, for defendant.

Rodman, contra.

Per Curiam. The bail have eight entire days in full term, after return of process against them, within which to surrender their principal; but *Sunday* is to be reckoned as one of the eight days.

(a) Vide *Wiggins v. Wilson*, 5 *Coven*, 420. *Warner v. Hayden*, 2 *Wendell*, 251.

END OF JANUARY TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN MAY TERM, 1812, IN THE THIRTY-SIXTH YEAR OF OUR
INDEPENDENCE.

TALLMADGE AND OTHERS *against* **RICHMOND, SHERIFF, &c.**

THIS was an action of *debt*. The declaration contained two counts; one general, for the escape of one *Edward Brockway*, a prisoner in execution at the suit of the plaintiffs, from the custody of the defendant, sheriff of the county of *Cayuga*; and the other special, stating the execution, &c., and the giving bail for the liberties of the gaol, and the escape from thence. The defendant pleaded *nil debet*, and subjoined a notice that he would prove a recaption on fresh pursuit, before action brought, also a voluntary return, before action brought, and also that after the alleged escape of *Brockway*, he was discharged by the Court of Common Pleas of *Cayuga* county, pursuant to the *act for the relief of debtors, with respect to the imprisonment of their persons*; and that the plaintiffs, knowing of the escape, appeared by their attorneys, and opposed the discharge of *Brockway*.

The execution was endorsed for 2,640 dollars, and was returned and filed on the 26th *January*, 1808, by *T. C. Dewitt*, the former sheriff of the county.

*The plaintiff offered to prove, by parol, that *Brockway* was on the gaol liberties when the late sheriff went out of office, in *March*, 1808, and remained on the limits at the time the defendant came into office, and was in his custody, in execution, at the suit of the plaintiffs. This evidence was objected to, but admitted by the judge. *Dewitt*, the former sheriff, who had been released by the plaintiffs, was sworn as a witness, and testified that *Brockway*, on the 1st *January*, 1808, was committed to prison on execution, at the suit of the plaintiffs; and that since the defendant succeeded to the office

Where an indenture of assignment of prisoners from the old to the new sheriff, specified a suit, by the title of "*Tallmadge, Smith & Co. v. Edw. Brockway*," this was held sufficiently certain, without giving the names of all the plaintiffs at large: it was a sufficient notice to the new sheriff of the execution against the prisoner.

Where the bond taken by a new sheriff for his security

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on granting the liberties of the gaol to a prisoner in execution, stated the amount of the execution, for which he was in custody, it was held conclusive as to the fact, so that the sheriff, in an action,

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afterwards, a-
gainst him for
an escape,
could not al-
lege that it was
not the true
sum, or that he
had not notice
of the true sum,
before the es-
cape. (a)

of sheriff, which was in the autumn of 1808, he admitted that *Brockway* was in his custody on the same execution, at the suit of the plaintiffs; the witness had seen *Brockway* on the liberties of the gaol; and, afterwards, saw him, several times, more than three miles without the liberties. The witness did not recollect that he mentioned to the defendant, the names of all the plaintiffs in the execution, but spoke of it as an execution in favor of *Tallmadge, Smith & Co.*, but he never had any other execution against *Brockway*, at the suit of the plaintiffs, or either of them. The county was surrendered to the defendant by one of the deputies of the old sheriff, who had a blank assignment from him, and he was not present at the time.

The indenture produced was dated the 3d *March*, 1808, and stated that *Dewitt*, the late sheriff, had delivered to the defendant, the now sheriff, &c., the bodies of the several persons therein mentioned, with the causes, enumerating them, among which was one entitled "*Tallmadge, Smith & Co. v. Edward Brockway*," on *ca. sa.* for two hundred sixty dollars and forty cents.

A bond, dated 31st *March*, 1809, given to the defendant, as security for granting the liberties of the gaol to *Brockway*, was produced, in which was mentioned the execution, and the sum for which he was in custody, as stated by the plaintiffs, except that the name of one of the plaintiffs was omitted. The defendant had previously taken a bond for the same purpose, but was dissatisfied with the security. This bond he did not produce at the trial, though notice had been given to him by the plaintiffs, for that purpose.

The defendant offered to prove, that *Brockway* was in his custody when the suit was commenced, and that if he had gone beyond the liberties, he had voluntarily returned; but the evidence *was objected to, and overruled by the judge; because the defendant had not accompanied his plea with an affidavit, that the escape was without his knowledge or consent; and a voluntary return before suit brought would not, in this case, constitute a defence. The defendant's counsel was about to address the jury, but was told by the judge, that there were no doubtful facts for the jury to decide; and the counsel declined summing up. The judge charged the jury, that there was sufficient evidence that *Brockway* had been in custody of the defendant, in execution, at the suit of the plaintiffs, for the amount endorsed on the execution produced; and that the plaintiffs were entitled to recover the sum of 2,677 dollars and 24 cents, being the amount of the debt, with the sheriff's fees on the commitment: and the jury gave a verdict for the plaintiffs accordingly.

A motion was made to set aside the verdict, and for a new trial: 1. For the admission of improper testimony; 2. For the misdirection of the judge.

(a) Where a prisoner who had been in execution was discharged by the plaintiff, but afterwards gave a bond for the limits to a new sheriff, it was held that no action could be maintained against the sheriff for a subsequent escape. *Poncher v. Holley*, 3 *Wendell* 184.

Richardson, for the defendant. It ought to have been shown that the prisoner had come legally into the custody of the defendant. The old sheriff must deliver over, by indenture, to the new sheriff, all the prisoners, with their respective executions; otherwise, it is an escape in him, and the new sheriff is not chargeable. (*Westby v. Skinner*, *Cro. Eliz.* 365. 3 Co. 71.)

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The form of the writ of discharge to the old sheriff, given by the statute, expressly recites such a delivery by indenture; (*Sess.* 24. c. 28. s. 1. 7 *Johns. Rep.* 137. 4 *Johns. Rep.* 469;) and it is the uniform practice founded on the rule of common law.

No indenture or delivery of the prisoner was shown, though the plaintiffs made such evidence necessary, by averring such a delivery in their declaration. The indenture produced does not support the averment; for the title of the cause, and the sum for which the defendant was in execution, are different.

The jury, not the judge, are to determine the fact of the arrest, and of the delivery over of the prisoner to the new sheriff.

Again, no bond for the liberties was shown; for the bond produced was illegal and void. It was for more than double the sum in the execution, including poundage and all other charges. The bond should be in the very cause, and existing at the time of the *escape*.

Cady, contra. An assignment by indenture, of prisoners, by *the old to the new sheriff, is not necessary. (2 *Bac. Abr. Escape*, n. 242. 4 *Bac. Abr.* 445. n. 6 *Mod.* 183. 3 *Com. Dig.* 289. (D.) The old sheriff may deliver the prisoners by *parol*; and an indenture is not requisite, unless the new sheriff requires it.

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The creditor is not bound to know that there is an assignment, or whether it is in due form or not.

The testimony of *Dewitt*, the former sheriff, was corroborated by the documents produced, and there was no question as to his credit. The bond was produced in evidence to show that the defendant considered *Brockway* a prisoner in his custody, and treated him as such. If the bond was for than double the amount of the execution, yet the defendant cannot take advantage of such an objection.

The name of *Tallmadge, Smith & Co.* was sufficiently descriptive of the plaintiffs; and the bond having been accepted by the defendant in that form, he cannot now object any want of certainty.

Should it be said that there is a variance between the allegation in the declaration, as to the delivery over to the new sheriff, and the description of the cause, as it appears in the assignment, it may be answered that the assignment was not offered or called for by the plaintiffs; but was voluntarily produced by the defendant.

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Rodman, in reply, observed, that sheriffs were favored in law, and were not to be made liable, unless clearly and strictly responsible.

It is a general principle, that prisoners may be received *on view*, by parol; but it must be in the gaol, and *on view* by the new sheriff. (*Dalton's Sheriff*, 14 to 20, and *passim*.) There must be an assignment, if he require it. If a prisoner within the walls of the gaol is not included in the assignment, it is an escape. A mistaken or false name or title of the suit amounts to an escape.

Again, there is an interval of seven days between the time of delivery over, alleged in the declaration, and the day of assignment or delivery, as proved at the trial, and during that interval there was an escape.

The new sheriff takes the prisoners by parol, at his peril. But an indenture was required in this case, and the names of the plaintiffs ought to have been correctly stated, otherwise it could not be known in what suit the prisoner was in custody.

The jury ought to have been allowed to decide on the existence of the bond, as a substantive fact; and on the credit of *Dewitt*, the old sheriff, the principal witness for the plaintiffs.

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*KENT, Ch. J. delivered the opinion of the court. This is a motion for a new trial, for the admission of improper testimony, and for misdirection of the judge.

That *Brockway* escaped after the defendant took charge of the county and of the prisoner, was proved by several witnesses. The only question that can arise upon the case, is, shall the defendant be chargeable for that escape? Whether he had given the liberties of the gaol to *Brockway*, with or without taking security, was not a material fact; for in no respect, or in any view, is the defendant entitled to avail himself of a return or recaption before suit brought, since he has not accompanied his plea with the affidavit required by the statute, that the escape was without his privity or knowledge. (*Laws*, vol. 1. p. 213. *sess.* 24. c. 28. s. 22.) (a) The single point is, was *Brockway*, when he escaped, the defendant's prisoner at the suit of the plaintiffs. He had been assigned over by the former sheriff, by indenture, and the suit of the present plaintiffs was specified under the title of *Tallmadge, Smith & Co. v. Edward Brockway*. This title of the cause was well enough, as it necessarily imported that the names of the plaintiffs to the *ca. sa.* were not given at large, and it does not appear that the defendant made any objection. It was notice that *Brockway* was in execution in a suit in which such a firm were plaintiffs, and it answered the purpose intended by the rule of law. All that the books say is, that the old sheriff, when he delivers over the prisoner, must give notice of all the

(a) 2 R. S. 437. sec. 64. See the judgment of the Court of Errors in *Richmond v. Tallmadge*, 16 Johns. Rep. 307.

executions against him. The rule does not require that this notice should contain the accuracy and precision requisite in special pleading. It must be construed according to the reason of the thing. If the indenture had said that *Brockway* was a prisoner on an execution issued at the suit of *Benjamin Tallmadge and others*, it would have been sufficient. It let the new sheriff know the fact of such an execution on which he was to hold the prisoner. If every particular was to be required, then the test and return of the execution, the sum endorsed, and the interest that was to be collected, and the attorney who issued it, ought all to be mentioned. To require such a nicety in these cases, would be productive of great public inconvenience. In *Westby's Case*, (3 Co. 71. b. Cro. Eliz. 365. *Moore*, 688,) the old sheriff, in assigning over a prisoner, against whom he had two executions, omitted to mention one of them, and the prisoner having escaped, the court held that the old, and not the new sheriff, was responsible for the escape, as to the omitted execution. But in that case it was agreed at the bar, and, according to the report of the case in *Moore*, the judges also agreed, that if the old sheriff had given notice, *by word*, of the omitted execution, it would have been sufficient to have charged the new sheriff, notwithstanding the omission in the indenture. *Dalton* (p. 16) lays down the same rule. So liberally did the judges, at that day, construe the rule, that the new sheriff must have notice of the executions; and it is to be observed, that this is not a statute provision, but an equitable rule of practice, for the security of the sheriff. The statute, by the writ of discharge, only requires, in general, that the old sheriff shall, by indenture, *deliver over the county, together with the rolls, memorandums, &c.*

The title of the cause mentioned in the indenture was sufficient to have enabled the sheriff to take a bond for the liberties. The statute prescribing the bond does not require the title of the cause to be precisely mentioned. It says nothing about it; the title of the cause need not form any substantive part of the penalty or of the condition of the obligation, and if mentioned in the recital to the condition, it is mentioned only as inducement, and any words which would make the title of the cause certain, by reference, would be sufficient. It is a settled rule that even a mistake in a recital to a bond does not vitiate, for it is no direct affirmation, and is not an essential part. (*St. John v. Diggs*, Hob. 130. Co. Litt. 352. b. 3 Ch. Cas. 101.)

But it is said that the true sum for which the prisoner was held was not mentioned, and that a much smaller sum was specified. In examining the original indenture, produced upon the argument, it was very equivocal and uncertain, whether the sum really intended, was two hundred and sixty dollars and forty cents, or two thousand six hundred and forty

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dollars. Whatever doubt there might be upon this point, there is conclusive evidence that the defendant was afterwards informed of the true sum, as the bond taken by him on the 31st *March*, 1809, for the liberties for *Brockway*, mentioned the true sum for which he was holden at the suit of the plaintiffs. That bond was produced at the trial, by the defendant himself, and it concludes him, as to the fact of notice at that time of the true sum. That bond also specified the names of all the plaintiffs to the execution, except one, so that the defendant must have excepted *Brockway* in execution under the indenture, at the suit of the plaintiffs, and have made subsequent inquiries as to the names of the house of *Tallmadge, Smith & Co.* *If the recital to this bond omitted one of their names, still that would not have impaired its security for the purpose it was taken; for a recital in a bond of a particular fact, estops the obligor from denying that fact. (*Willes's Rep.* 9. 12.) But this point is now immaterial in this suit, and the only answer to this fact of notice of the true sum is, that the escape was prior to the date of this bond. But this answer is not sufficient, for considering the uncertainty whether the true sum was really mistaken in the indenture, the defendant ought to have shown *the time when* further information was given to him than what appeared in the indenture. The presumption is, that the defendant knew the true sum before the date of the bond of the 31st of *March*, 1809, for he had before taken another bond for the liberties, with other securities, and that bond he refused to show upon the trial. The inference is, then, irresistible, that *that* bond would have disclosed the fact of the true sum being known to the defendant before the escape.

This whole defence, of a want of notice of the true sum for which *Brockway* was charged in execution, was probably a thought which suddenly arose at the trial, and I think it extremely ill supported.

The question on the credibility of the testimony of *Dewitt*, the late sheriff, does not appear even to have been raised at the trial, nor was his testimony essential, as every requisite fact was proved without it. His character was not attacked, nor was there any just cause for impeaching his testimony on any essential point. If the jury had found a verdict for the defendant upon this case, the court would have been obliged to have set it aside as against law, and why should we grant a new trial when we see from the case, that the plaintiffs would again be entitled to a verdict? There is no suggestion that any further evidence is behind to alter the state of the case. The suggestion of the judge at the close of the trial was no more than what is usual and proper, when the case presents no material facts involved in doubt, and when the conclusion of law upon those facts appears clear to the judge. It was only a suggestion to save time, and one which still left

it open to the judgment and election of the counsel, to address the jury.

For these reasons, the court are of opinion that the motion for a new trial must be denied.

SPENCER, J. dissented.

Rule refused.

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***JACKSON, *ex dem.* BANYAR AND OTHERS, against
WILLSON AND OTHERS.**

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THIS was an action of ejectment. The material facts in the case are as follows :

At the trial, before Mr. Justice *Van Ness*, the lessors of the plaintiff gave in evidence letters patent, dated *July*, 1761, to *Isaac Sawyer*, *Jonathan Wells*, and fifty-nine other persons, commonly called the *Pittstown* patent; a release, dated 7th *September*, 1761, from *Joseph Wells* and forty-six others, patentees, of their undivided right to *Isaac Sawyer*, *Goldsbrow Banyar*, and four other persons, under whom the lessors claim the premises in question; a deed of partition dated the 26th *May*, 1763, between the last-mentioned six persons, whereby they made partition of the lands contained in the boundaries of the *Pittstown* patent, pursuant to a map thereunto annexed, excepting lots No. fifty-three, and No. fifty-four, the premises in question, which were laid down on the map, but not drawn for or divided, by such partition.

The deed of partition, after reciting, that by several grants, the parties thereto had obtained title, as tenants in common, to the *Pittstown* patent, and their agreement to make partition of the whole of the said tract, called *Pittstown*, and after specifying the division by ballot, and the lots drawn by the several parties, proceeded with the several releases to the respective parties, of all lands so laid out and divided into lots, parts and parcels of lots, on the map annexed, and drawn to their respective shares. It appeared also, by the same partition deed, that the boundaries of the *Pittstown* patent included, as well as other lands, all or most of the lands granted by letters patent, dated the 19th *May*, (1737,) 10 *Geo. II.* to *D. A. Schuyler* and others, commonly called the *Synhanesset* patent, which included, according to the map, lots No. fifty-three, and fifty-four, the premises in question.

The plaintiff then deduced, by proof, a regular title to his lessors, to eight-ninth parts of the patent of *Pittstown*.

It was also proved, by a surveyor, that the defendants were in possession of lots No. fifty-three, and fifty-four, and that they were within the bounds of *Pittstown*.

**Benjamin Smith*, a witness for the defendants, testified that his father, in 1773, took possession of lot No. fifty-four, claiming title under *Robert* and *John Leake*; and *John*

A patent was granted, in 1761, which included also lands granted by a patent, dated in 1737, and the second patent recited the first, and the proprietors of the second patent, who had made purchases under the first, made a partition of the lands held under the second, excepting two lots, which were included within the boundaries of the first patent.

In an action of ejectment, the plaintiff claimed the two lots under the patent of 1761, and the defendants claimed to hold under *A.* who claimed under *B.*, one of the patentees, named in that patent.

It was held, that the recital of the former patent, being of a particular fact, directly affirmed, estopped the plaintiff from denying the existence of such prior patent; that the mere fact that *B.* was

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a patentee in the patent of 1761, was not

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sufficient to
prove that he
held the two
lots under that
patent; the
omission to di-
vide the two
lots, being evi-
dence of the
sense of the
proprietors of
the second pa-
tent, that they
did not claim
those lots un-
der it. (a)

Griffiths was, at the same time, in possession of lot No. fifty three. The father of the witness continued in possession of No. fifty-four, three years, and cleared about twenty acres. Various persons, in succession, had the possession, afterwards, who claimed to hold as owners. The witness did not know under whom the *Leakes* claimed, but he understood that their title and that of the *Pittstown* patent were the same. The defendants had not been in possession twenty years.

Another witness testified, that about forty years ago, his father had possession of lot No. fifty-three, under *Isaac Sawyer*, and held it about two years; that *John Griffith*, afterwards, had possession, and claimed the land as his own. The witness understood that the lands were in *Pittstown*.

The defendants gave in evidence a quit-claim deed, dated *December 1, 1795*, from *Nathaniel Purdy* to *Ebenezer Wilson*, one of the defendants, for an undivided moiety of lot No. fifty-three, and lot No. thirty-five, which were stated to have been forfeited, by the attainder of *Robert Leake*; and a quit-claim deed from *Levinus Lansing*, one of the lessors, to *Ebenezer Wilson*, dated *December 2, 1795*, for the west half of lot No. fifty-four, also stated to have been forfeited by the attainder of *Robert Leake*, which deeds contained a proviso against any warranty of title. The defendants also gave in evidence a deed from *Martha Norton* to *E. Wilson*, dated *10th December, 1797*, for the undivided half part of lots No. fifty-three, and fifty-four, with covenants of warranty as to the title.

Another witness testified, that in 1780, one *Dunham* took possession of lot No. fifty-four, under *Robert* and *John Leake*, and that the possession was in other persons, successively, until the defendants took possession of the west half, in 1794, and of the east half in 1796; that about fifteen years ago, rent was demanded by the heirs of *Leake*. That *E. Wilson*, one of the defendants, bought lot No. fifty-three, in the year 1791, of one *Purdy*, who purchased it of the widow of *Isaac Sawyer*; rents were collected by *R. B. Norton*, as heir of *John Leake* from *Dunham*, who had paid rent to *Leake* in his life-time.

Thomas Sampson testified that the *Leakes* claimed under *Pittstown*, and under *Wells*, one of the original patentees. One of the heirs of *John Leake*, since the late war, re-entered on lot *No. fifty-four, for rent. Both lots fifty-three, and fifty-four, had been possessed by tenants of the *Leakes* for above twenty-four years.

The judge declared his opinion to the jury, that both parties claimed under the *Pittstown* patent, that the defendants had given in evidence no paper title adverse to the *Pittstown* proprietors, until the deed from *Lansing* to *E. Wilson*, in 1795; that the *Leakes* appeared without any regular title, claiming under the *Pittstown* patent, and that the subsequent

(a) Vide as to
scitals, *Jack-
son v. Harring-
ton*, 9 Cowen,
86.

settlers had claimed under the *Leakes*; that if the *Leakes* had title, it appeared to have been derived from *Wells*, one of the original proprietors; and that as the lots in question had not been divided, the *Leakes*, and those deriving title under them, could only be tenants in common, with the other proprietors; that their possession could not operate against the lessors of the plaintiff; and that the plaintiff was entitled to recover on the rights of his several lessors, excepting that of *Lansing*, which was barred by his deed. The jury accordingly found a verdict for the plaintiff.

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A bill of exceptions was tendered to the opinion of the judge, who sealed the same, pursuant to the statute.

Bliss and *Foot*, for the defendants, contended, 1. that the lessors, by their own showing, were not entitled to recover. They proved no title in themselves. Their map shows that lots No. fifty-three, and fifty-four, lie within the *Synhaneset* patent. Their patent and partition both recognise the title under that patent, as valid; and the lessors could only derive title, therefore, under *Schuyler and others*. Though the *Pittstown* patent covers lots fifty-three, and fifty-four, yet as it recognises the validity of the prior patent to *Schuyler and others*, it could give no title to the lessors to lands lying within the other patent. It was necessary for the lessors to show that the premises in question were within the lots which they had purchased of *Schuyler*. As they have undertaken to enumerate the lots purchased of *Schuyler*, it is an admission that they claimed no more; and their own witness showed that the premises lay within lot No. two, which was not purchased of the proprietors of *Pittstown*.

2. The right of the lessors to recover, was barred by an undisturbed possession of the defendants, and those under whom they claim, adverse to the lessors, for near thirty years. This is established by the testimony given at the trial.

If the lots originally belonged to the patentees of *Pittstown*, in common, the conduct of the persons in possession, for so long *a time, amounted to an *ouster* of the other proprietors, and severed the tenancy in common, as to the lots in question; and the possession has been adverse to the lessors for more than twenty years past. If one tenant in common *ousts* his companion of the possession, the other may maintain ejectment against him; (*Litt. s. 322. Com. Dig. Estate, (K. 8;)* and confession of lease, entry, and ouster in ejectment is sufficient, without proving an actual ouster. (*Burr. 1895. Cowp. 27. 1 East, 568.*) A possession for twenty-six years, by a tenant in common, has been held sufficient evidence to be left to a jury to presume an ouster or adverse possession. (*Fair-claim v. Shackleton, 5. Burr. 2604.*)

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Mitchell and *Van Vechten*, contra, insisted that to render an adverse possession sufficient to toll the entry of the plaintiffs, it should be taken under a claim or color of title, be hos-

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tile to that of the lessors of the plaintiff, and have been continued uninterruptedly from its commencement. (1 *Johns. Rep.* 156. 158.) Here the defendants claim under the same title. (2 *Johns. Rep.* 234. 4 *Johns. Rep.* 390.)

There is no evidence of the *Synhanesset* patent, except the recital in the *Pittstown* patent. But such a recital is not conclusive. Whatever may have been the ancient notion on the subject, the received opinion at the present day, is, that recital is *secondary* evidence, and admissible only when the recited deed is shown to be lost, or some other reason given for not producing the regular and best evidence of it. (*Peake's Evidence*, 113, 114. c. 2, s. 4. *Ford v. Grey*, 6 *Mod.* 45. See also 3 *Ch. Cas.* 101. *Co. Litt.* 352. b. *Hard.* 120. *Vaughan*, 71. 2 *Lev.* 108. 2 *Roll. Abr.* 678. 2 *Vent.* 171. *Jenk.* 255.)

Where two claim by the same title, an adverse possession will not be presumed, so as to toll the entry of the other. (*Woodfall, Tenant*, 444.) And where a person enters under another, and transfers the possession, his grantee is always presumed to hold under the same title. (1 *Caines' Rep.* 401. 4 *Johns. Rep.* 212.)

Per Curiam. The ground on which the defendants rest is, that the lessors of the plaintiff, by their own showing, in the recitals to the partition deed of 1763, admit an elder patent, covering the premises, and that although the recitals show a purchase of a part of this patent, there is no purchase of the premises stated. There is, then, a title existing out of the lessors, as they are estopped by the recital from denying the existence of such a prior patent. The recital is here of a particular fact directly affirmed. (*Shelley v. Wright, Willes's Rep.* 9.) But the title under which the defendant's claim appears to have been derived from the *Leakes*, and they to have claimed under *Wells*, who was one of the *Pittstown* proprietors. The source of title set up by both parties would seem, at first view, to be the *Pittstown* patent. But *the mere fact that *Wells* was a *Pittstown* patentee, is not sufficient to prove that he held the premises under that patent, when, by the plaintiff's own showing, the premises were covered by an older patent, and under which purchases had been made by the *Pittstown* proprietors. The omission to draw for and divide lots fifty-three and fifty-four is, of itself, evidence of the sense of the proprietors that the premises were not claimed by that patent. It ought to appear, clearly and positively, that *Wells* claimed the premises under the *Pittstown* patent, and transmitted such claims to the *Leakes*, before we can conclude that the *Leakes* possessed under that title, and as tenants in common with the other *Pittstown* proprietors. It is a more reasonable presumption, because it is in harmony with the rights and the facts disclosed by the partition deed, that *Wells* had purchased in the title under the *Synhanesset* patent, and

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held under that title, and if so, the lessors of the plaintiff were not entitled to recover.

A new trial ought, therefore, to be awarded, with costs to abide the event of the suit.

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DENTON AND OTHERS *against* LIVINGSTON, LATE SHERIFF, &c.

THIS was an action of *assumpsit*. Besides the usual money counts, the declaration contained two special counts; 1. That the defendant, on the 20th *June*, 1811, being indebted to the plaintiffs in 1,000 dollars, for so much money by the defendant before that time collected and received on a writ of *venditioni exponas*, issued out of this court and directed to and received by, the defendant, as sheriff of the county of *Columbia*, at the suit of the plaintiffs, against the goods, &c. of one *Samuel Edmonds*, &c. for six hundred and thirty-one dollars and twelve cents, damages and costs, &c. and being so indebted, the defendant, in consideration thereof, &c. undertook, &c. 2. Whereas the defendant, late sheriff, &c. by virtue of another *venditioni exponas*, to him directed, commanding him to levy the sum of six hundred and thirty-one dollars and twelve cents, of the goods and chattels of *Samuel Edmonds*, &c. the defendant, then being sheriff, &c. by virtue of the said *venditioni exponas*, the said goods and chattels *of the said *Samuel Edmonds*, found in his bailiwick, sold at public auction or vendue; and that divers goods and chattels of the said *Edmonds*, so exposed for sale, were purchased by *W. A.* he being the highest bidder for the same, for a large sum of money, to wit, a sum which, together with the moneys before collected on the *venditioni exponas*, by the defendant, were sufficient to pay and satisfy the money directed to be levied by the said *venditioni exponas*, together with the fees of the defendant, as sheriff, and were delivered to the said *W. A.* to his satisfaction; yet the defendant has not paid to the plaintiffs the sum of money so directed to be levied, &c. or any part thereof, although, &c.

The defendant pleaded *non assumpsit*, with notice.

The cause was tried at the *Columbia* circuit, before Mr. Justice *Yates*.

An exemplification of the judgment at the suit of the plaintiffs against *Edmonds*, and a *test. fieri facias* was produced, on which the defendant had endorsed a return, as follows; "By virtue of the within writ of *test. fi. fa.* I have taken goods

* An action of *assumpsit* lies against a sheriff, for the amount of the sale of goods by him, under a *venditioni exponas*, though the purchaser to whom the goods are delivered, refuses to pay for them. (a)

Where a sheriff returns that he has levied on the goods of the defendant, to the value of the debt or damages in the execution, whether he is bound by the value returned, or not, *dubatur*. (b)

If the sheriff

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delivers the goods seized and sold, without receiving the money, he is answerable for the amount.

Bank shares, or shares in a public library, being mere *choses in action*, cannot be seized and sold under an execution. (c)

(a) Vide *Armstrong v. Garrow*, 6 Cowen, 465. *Townsend v. Olin*, 5 Wendell, 207. And a previous demand is not necessary. *Dyger v. Crane*, 1 Wendell, 524.

(b) Vide *Doty v. Turner*, 8 Johns. Rep. 20.

(c) A mere *chase in action* cannot be taken in execution. *Bogert v. Perry*, 17 Johns. Rep. 351. *Ingalis v. Lord*, 1 Cowen, 240. But money, bank notes, and every thing tangible, except *choses in action* and articles exempt by statute, may be levied on. *Handy v. Dobbin*, 12 Johns. Rep. 220. *Holmes v. Menester*, Id. 395. Vide *Turner v. Fendell*, 1 Cranch, 117.

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and chattels of the within-named *Samuel Edmonds*, to the value of the damages within-mentioned, which goods and chattels remain in my hands unsold, for want of buyers," &c.

The *venditioni exponas* under which the sale was made was also produced. The plaintiffs also proved that the amount of the sales was sufficient to satisfy their execution, and that the sale was for immediate payment.

The defendant proved, that among the goods and chattels sold was a sloop which sold for two hundred and seventy-five dollars, a share in the *Bank of Columbia*, which sold for fifty dollars, and three shares in the *Hudson* library, which sold for nine dollars: that at the time of the sale the sloop was at *Poughkeepsie*, and *Ashley*, the purchaser, afterwards refused to pay for her, on the ground that the defendant had not delivered to him the possession of the sloop; and she was afterwards sold on another execution against *Edmonds*, by the sheriff of *Dutchess* county, which execution issued subsequent to the levy under the execution of the plaintiffs. The defendant contended that the shares were not liable to be sold on execution, and that the defendant was not liable for them, *Ashley* having refused to pay for them.

The plaintiffs proved, that when the levy was made on the sloop, she lay at *Hudson*, in the county of *Columbia*, and *Ashley* gave a receipt for her to the sheriff, who at the time of the sale, *stated that she was receipted by a responsible person; and she was struck off to *Ashley*, as the highest bidder.

The judge charged the jury, that the plaintiffs were not entitled to recover for the shares, as they were not the subject of sale, nor for the amount at which the sloop sold, as it did not appear that the defendant had ever received the money; and that the jury must find for the plaintiffs the balance, after deducting those items. The jury accordingly found a verdict for the plaintiffs, for ninety-five dollars. *Van Buren* and *Foot*, for the plaintiffs, contended that the sheriff was answerable for the value of the goods as returned, after he had seized them. They cited 2 *Saund.* 643. *Clerk v. Withers*, 2 *Ld. Raym.* 1072.

E. Williams, contra, insisted that the sheriff never having received the money from *Ashley*, this action could not be maintained, for no implied contract existed. The proper remedy is an action on the case, sounding in *tort*, for a breach or neglect of duty. That no action lies for a partial satisfaction of an execution. The proper course is, to rule the sheriff to return the writ.

KENT, Ch. J. delivered the opinion of the court. It is not a question, upon the present motion, whether the last count stated in the case was properly joined with the other counts. The first special count stated, is upon an implied *assumpsit* to pay the amount of moneys collected and received upon the writ of *venditioni exponas*, and the point is, how far the evidence supports the count.

There is no doubt but that a sheriff is responsible in *assumpsit*, upon the facts stated in that count. (*W. Jones*, 430. *Hob.* 90

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206.) It might be a question whether, after the sale, the sheriff was not concluded by the value of the goods, as stated in his return to the *fi. fa.* for he returned that he had taken goods and chattels to the value of the damages in the execution. The general rule is, that an officer cannot be admitted to contradict his own return. In *Clerk v. Withers*, (2 *Ld. Raym.* 1072. 6 *Mod.* 290.) *Holt*, Ch. J. said, that the sheriff was bound by the value returned, and that he was bound to see that the goods sold for that value; and he gives this reason for his opinion, that when the sheriff levies on goods to the value of the debt, the defendant is discharged, *whatever may become of the goods, and he may plead such a levy in bar to an action of debt or *sci. fa.* on the judgment. This point, however, does not appear to have been judicially settled; and in the ancient case of *Sly v. Finch*, (*Cro. Jac.* 514,) the judges seem to have entertained a different opinion; for *Houghton*, J. said, that the sheriff was not estopped by the return value, and that he might sell the goods for more or less, and that it would not be reasonable to hold him to the estimated value. *Dodderidge*, J. and *Montague*, Ch. J. rather acquiesced in this principle, and only held, if the property should in the mean time perish, after the levy and before a sale, the sheriff should be held to his value, as it would be impossible then to reduce the value to certainty. In the present case the counsel for the plaintiffs do not appear to have contended, at the trial, for the value of the goods as returned to the *fi. fa.* but to have equitably referred the case to the fact of the amount of the sales. If the sheriff conducts himself throughout the business with diligence and fidelity, this is certainly the more just rule, and the judgment ought not to be considered as any further satisfied, as against the original defendant, than the amount of the proceeds of such sale, for it may often happen that the property seized and returned as of the value of the debt, may be found not to belong to the defendant, or may be found to be of much less value, by the fall of the market between the levy and the sale, or by means of some concealed defect or infirmity. We shall, therefore, waive the further consideration of this point, and proceed as the plaintiffs did at the trial, to consider the actual sum for which the sheriff ought to account upon the sale, as made and proved.

1. He is answerable for the amount of the sale of the sloop, and his excuse for not returning the money is insufficient. Instead of retaining the sloop in his possession between the levy and the sale, he delivered her to *Ashley*, the purchaser; and as he afterwards sold her to him, and has lost the possession, he is answerable for the money she sold for. There is no other remedy for the plaintiffs. They cannot call upon the original defendant for the amount of this sloop, for he would plead this seizure by the sheriff in bar; and if the sheriff, by such means as the delivery and subsequent sale of the chattel,

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without the money, could avoid answering for the amount, there would be no certainty and safety to the creditor, by the process of execution.

2. But the bank and library shares were levied on by mistake, *for these were mere *choses in action*, and not the subject of a levy and sale by *fi. fa.* any more than bonds and notes; and such things cannot be taken in execution. (*Francis v. Nash*, 7 Geo. II. K. B. cited in *Com. Dig.* tit. *Execution*, c. 4. (a))

As, therefore, the charge of the judge was incorrect in ruling that the defendant was not answerable for the amount of the sale of the sloop, there must be a new trial, with costs to abide the event.

Rule granted

(a) 1 Cas. temp. Hardw. 53, S. C. 2 Bernard, K. B. 225, S. C.

JACKSON, *ex dem.* NEWCOMB, SUPERVISOR, &c. against SMITH AND OTHERS.

Where a patent for a tract of land is granted, reserving a certain number of acres for public uses, it seems that the patentee has the right to elect in what part of the tract the land reserved shall be located.

Where a survey of land was made by the direction and under the observation of the grantee, it was held that he could not, afterwards, especially after the lapse of 26 years, vary the location, but must be deemed as having assented to the survey as made. (a)

THIS was an action of ejectment for lands in *Plattsburgh*.

A patent dated 26th October, 1784, was granted by the people to *Z. Platt*, for 31,360 acres of land, in which there was a reservation of nine hundred and sixty acres; four hundred acres for the use of the gospel, and four hundred and sixty acres for the use of schools.

Platt caused the outlines of the patent to be surveyed; and a map thereof to be made, designating all the lots, including two lots for the use of the gospel, and three for the use of schools, and directed a survey of the whole tract to be made, according to such map. During the survey, he resided at *Plattsburgh*, and the surveyors reported to him weekly; and if any of the lines were found to be incorrect, they were ordered to correct them according to the map, which was done. The defendants, deriving title under *Z. Platt*, claimed the premises in question, as part of lot No. sixty-six, have exercised acts of ownership, by cutting timber, and were in possession of the land, but had made no improvements.

Part of the land reserved for the use of the gospel was described, in the *field book* of the survey, as the *glebe lot*, and its metes and bounds were given. The courses and lines of the lot, as given in the *field book*, are all remaining. The premises in question, as described in the *field book*, were included in the *glebe lot*, and in lot No. sixty-six, but as they are designated on the original map, the premises are within lot No. sixty-six, but are not included in the lot designated as the *glebe land*.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the facts above stated.

**Woodworth* and *Skinner*, for the plaintiff. The grantors,

(a) Vide *Jackson v. McCall*, 10 Johns. Rep. 377. *Jackson v. Hogeboom*, 11 Johns. Rep. 163. *Jackson v. Tallmadge*, 4 Cowen, 450.

the people, or the supervisors, as their representatives, have a right to elect in what part the eight hundred and sixty acres reserved are to be located.

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The party who has the benefit of election, has the right of election. (*Leo.* 30. 268.) This rule prevails as to grants between private persons, and the doctrine is stronger as applicable to a case like the present, in which the people are the grantors. If this doctrine is correct, there is an end to the controversy, for we elect the very land in dispute. There can be no objection as to the time when the election is made, as the land remains in a wild and uncultivated state. By bringing this suit, the lessor of the plaintiff has made the election.

But admitting that the patentee had the right of election, the plaintiff must recover. *Z. Platt* made a map for the direction of the surveyors, on which he marked the glebe lot. If the surveyors have made a mistake, we must now take according to their survey. When the patentee made his election he was bound to designate the land with so much accuracy and precision, as to enable the other party to know what land he was to take. The field book, or actual survey, though it differs from the original map, must be conclusive. It was the duty of *Platt*, if there was a mistake, to correct it immediately. After an acquiescence of twenty-six years in the survey, at which he was present, he must be bound by it. (*3 Johns. Rep.* 269. 387.)

Russel, contra. The party who is to do the first act, has the right of election. (*Co. Litt.* 145, a. *Com. Dig. Election*, A. 1. *2 Term Rep.* 439.) Then who was to do the first act? Not the grantors. The patentee was to consummate the grant, by taking possession of the land granted. If the rule contended for by the plaintiff is correct, the patentee never could take possession until the state had made an election as to the location of the land reserved. He could not compel the state to elect, and if he should take possession before the state had made its election, he would be liable to be dispossessed, in case it should elect the very land in his possession, and that after it had been improved for years.

If the state had the election, it is concluded by electing to take the *glebe lot*, as laid down on the map, for the action is for the premises as part of that lot. Again, if the state had the right of election, it is gone by lapse of time, not having been exercised for twenty-six years.

If the patentee had the right to elect, we contend that he exercised *that right when he made the map, and designated the *glebe lot* thereon. An election may be determined by words or acts.

If the survey was erroneous, *Platt* was not concluded from showing it to be incorrect. (*5 Johns. Rep.* 507.)

Per Curiam. Assuming what the defendants contend for, that the election of the location of the gospel lot belonged to

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Z. Platt, the patentee, there is sufficient evidence of his locating it, as actually run out by the surveyor, and designated by marks and monuments. His first location on the map was corrected and controlled by his subsequent assent to the lot as run out. He could not have been ignorant of the location by the surveyor. He resided at *Plattsburgh*, near the premises, and the surveyors reported to him weekly, and he corrected what he deemed incorrectly run. The N. E. corner of the gospel lot, by the field book, began at a beach tree, on the river *Saranac*, and about seven chains E. of where *Vandenburg* had his saw-mill. This was a place of notoriety, and it could not have passed without observation.

The plaintiff is accordingly entitled to recover.

JACKSON, *ex dem.* JADWIN, against JOY.

Bleeker's map of the *Hosick* patent, made in 1754, is not conclusive, where it differs from the actual survey or field book made by him.

The question of adverse possession, ought to be left to the jury, and the judge, having directed the jury as to that fact, a new trial was granted.
(a)

THIS was an action of ejectment for land, in *Scaghticoke*, being part of lot No. forty, in the *Hosick* patent.

The cause was tried at the *Rensselaer* circuit, in *September*, 1809, before Mr. Justice *Van Ness*. The following are the material facts in the case.

Bleeker's map of partition, and field book of the survey of the *Hosick* patent, made in 1754, were produced at the trial. The plaintiff proved title to lot No. forty, in that patent. *Evert Van Alen*, a witness, surveyed lot No. forty-one, under which the defendant claimed title to the premises. By this line, the premises in question were included in lot No. forty, but there were no marked trees along the disputed tract. He run the line within a rod of the river, near the bend, and found a marked tree at the brow of the hill. The course of the east line corresponded with *Bleeker's* map and field book. The distance mentioned in *Bleeker's* field book, is two hundred and ten chains from the place where he began to run his line, and on the map it is two hundred and thirteen chains. That between the actual survey of *the witness, and that of *Bleeker*, there was a difference of three chains, at the bend of the river. And the witness stated that *Bleeker's* traverse of the river, if he made any, was incorrect, but he believed that *Bleeker* never made any actual survey of the river.

Another witness testified, that he traced the line of lot No. forty-one, in 1775, or 1776, with *Jadwin*, and found marked trees all along the line, to *Van Alen's* termination of it, at the river. One *Chase* and others, were in possession of the premises. One of them, *Hanson*, said he purchased of *Jadwin*, and claimed the premises as his own, and admitted it was within lot No. forty. The claimants against *Jadwin* alleged that the line stopped at the bend of the river.

Another witness testified, that *Hanson* owned the land ad-

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(a) The question of adverse possession is for the jury; but the trial of such possession often involves questions of law which the court is to decide; and in such case the judge should submit the question of fact to the jury with his directions as to the law. *Clapp v. Bromagham*, 9 Cowen, 530.

joining the premises in question, and that his father, in 1782, hired the land of *Hanson*; that *Jadwin* collected the rent for *Hanson*; and that about fifteen years ago, *Jadwin* had a survey made and claimed the premises in dispute. *Chase* and one *Jacobs*, who were in possession, agreed, about the year 1790, with *Jadwin*, that if he would show a title to the land, *Chase* would give him another lot in exchange for it. *Jadwin* exhibited his title to one *Freleigh*, who decided that *Jadwin* had no title. They afterwards agreed to submit the question to *C. Sands*, but whether it was done, did not appear. The premises have been improved above thirty years, and the occupants claimed to hold under lot No. forty-one. Several other witnesses testified as to the line and marked trees, &c.

The judge charged the jury, that the *map* made by *Bleecker* was not conclusive, but the line between lots No. forty and forty-one, as run by *Van Alen*, was proved to be the true line, and corresponding with the actual survey and *field book* made by *Bleecker*. That the defendant must rest entirely on his adverse possession, which he had not proved, and that they ought to find a verdict for the plaintiff. The jury found a verdict accordingly.

A motion was made to set aside the verdict, and for a new trial.

Foot, for the defendant.

Van Vechten, contra.

**Per Curiam.* The premises lie in lot No. forty, which belongs to the lessor of the plaintiff. The defendant, who claims under title to lot No. forty-one, contends, that the line run by *Bleecker*, as the division line between those lots, terminated at the pine tree. But the line must be continued to the river, and the testimony fully establishes a continuation of a line of marked trees. *Bleecker's* map has never been considered as conclusive, in opposition to the true lines, founded upon his actual survey. In all the cases, hitherto before the court, respecting the *Hosick* patent, the map and the survey of *Bleecker* were assumed to agree, and it was *Bleecker's* survey that the courts have so repeatedly sanctioned. (2 *Caines's Rep.* 177. 2 *John's Rep.* 297. 5 *Johns. Rep.* 496. 506.) On the part of the defendant, there is, however, a strong case of adverse possession made out. This possession has been continued for nearly forty years, and would be conclusive, unless the *agreement* said to have been made in the year 1790, between *Jadwin*, *Chase* and *Jacobs*, should be deemed sufficient to take the case out of the statute of limitations. By that agreement, the possession was to be delivered to *Jadwin*, if he would maintain a title, and *Jadwin* submitted his title to one *Freleigh*, who decided against its validity. It was afterwards agreed to be submitted to *C. Sands*, but this agreement was never carried into effect. The decision by *Freleigh* was nineteen years before the trial; and it is reasonable to presume

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that *Jadwin*, at that time, had abandoned his title. This question of adverse possession, ought at least, to have been submitted to the jury.

A new trial must be granted with costs to abide the event of the suit.

JACKSON, *ex dem.* HALL AND OTHERS, *against* BURR.

A. by his last will and testament, directed his executors to pay his debts, and to pay 22

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pounds to his wife, &c. and gave legacies to his several children, by name, and ordered his executors to have his real and personal estate appraised, and if the amount of the sums bequeathed, amounted to more than the value of his estate, the surplus to be divided between the legatees, in proportion; and if it amounted to less, a deduction was to be made, in like proportion; provided that his debts and funeral charges should be first paid: and he declared that it was "to be understood that each of the heirs and legatees named, were to receive their several sums out of his estate in lands and goods and chattels, which he left at his decease." And he appointed two of his sons and legatees, his executors.

It was held, that there was

THIS was an action of ejectment, brought to recover the *one-eighth* part of a farm in *Canaan*, in the county of *Columbia*. The cause was tried, in *December*, 1811, before Mr. Justice *Yates*.

*A verdict was taken for the plaintiff, subject to the opinion of the court, on the following case.

Gideon Burr, father of the defendant, and grandfather of the lessors of the plaintiff, died seised of the farm in question, in 1791, leaving seven children, and one granddaughter, his heirs at law. *Elizabeth*, one of the children, married *Benjamin Hall*, and both died, leaving the lessors, their heirs at law.

The defendant gave in evidence the last will and testament of *Gideon Burr*, dated the 11th *February*, 1784. The testator directed his executors to discharge his debts out of his interest and estate; and what remained he devised as follows: "I give to my beloved wife one-third," &c., and I also order my executors to pay her twenty-two pounds, as a recompense for a certain piece of land, which I sold in the state of *Connecticut*, which belonged to her. "I also give to my son *Gidcon Burr*, two hundred twenty-seven pounds, deducting twenty-seven pounds, before given him." And after giving legacies, in like manner, to his other children, he directs, as follows: "And furthermore, because it is uncertain what my estate may be worth, at my decease, I order my executors to appoint two or more men to appraise my real and personal estate, and take an inventory thereof; and if, upon the estimate of my estate, it shall appear that there is more than to the amount of what is here given to the fore-mentioned persons and heirs, they shall each receive of the surplus, in proportion to what is herein given them; and if it shall not amount to what is herein given, each of the heirs aforesaid shall receive less, in the same proportion to this proviso; that my debts and funeral charges be first taken out and paid. And furthermore, it is to be understood, that each heir and others aforesaid, are to receive their several sums out of my estate, in lands, goods and chattels, which is left at my decease: And lastly, I ordain my sons *Gideon Burr* and *Ozias Burr*, to be executors," &c.

Van Buren, for the plaintiff, contended, that the real estate was not devised by the will, either in express terms, or by im-

plication. (6 *Term. Rep.* 671. 11 *East.* 220. 2 *Vern.* 513. *Lovell*, 153. 8 *Johns. Rep.* 145.) That if the executors had a power to sell, it had never been executed, and the estate descended and remained in the heirs at law.

E. Williams, contra, insisted that the executors took both the real and personal estate by the will, as a devisee in fee, charged *with the payment of the legacies. (1 *Term Rep.* 414. *Eq. Cas. Abr.* 197, 198. 3 *Burr.* 1662. 6 *Johns. Rep.* 190) And that, at any rate, the executors were entitled to the possession of the land, under the will.

Per Curiam. There is no devise of the real estate to the defendant. There is nothing which denotes such an intent. The defendant had his specific legacy in money, with the rest of the children. He is not distinguished from the other heirs, in any other respect than that he is made executor. The most that could be deduced from the will is, that the executors had power to sell the land, and if that were so, the land in the mean time, and until the sale, would descend to the heirs at law. There must be judgment for the plaintiff.

Judgment for the plaintiff.

(a) A direction in a will, to executors to sell lands, to pay legacies and distribute the residue, does not break the descent to the heir at law though he be expressly disinherited. To cut off the heir at law the estate must be devised expressly, or by implication, to some other person. *Jackson v. Schaubert*, 7 *Cowen*, 187. *S. C.* in error, 2 *Wendell*, 13, where the judgment was reversed, but on a distinct ground. Vide *Jackson v. Potter*, 4 *Wend.* 672.

KNICKERBACKER against KILLMORE.

THIS was an action of covenant. The declaration stated, that by a deed made between the defendant and the plaintiff, dated 25th *April*, 1807, the defendant bargained, sold, assigned, transferred and set over to the plaintiff, his executors, &c., all the parcels of land and premises contained and described in a certain lease or articles of agreement, made between *Robert Livingston*, of the one part, and *J. Killmore*, of the other part, dated the 1st of *May*, 1790; to have and to hold the same to the plaintiff, during the lives mentioned in the said lease, subject to the rents and covenants in the said lease contained, &c., and that the defendant in and by his said deed, did covenant and agree with the plaintiff, that he, the defendant, had good and lawful right to bargain and transfer the said premises, and that the same were then free and clear from all arrears of rent, or other encumbrances whatsoever, &c. The plaintiff averred that the premises were not, at the time of executing the said deed, free and clear from all arrearages of rent, and other encumbrances whatsoever; but that the same were encumbered with a good and lawful title of *John Livingston*, in and to the premises, which lawful right and title accrued to him, at and before the bargain and sale from the defendant to the plaintiff, *and having such lawful right and

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no devise of the real estate; that the executors, at most, had a power to sell the lands; and if so, the estate, in the mean time, and until it was sold, descended to the heirs at law. (a)

A. a lessee, bargained, sold and assigned the leasehold premises to B. "to have and to hold the same, in as ample a manner, to all intents, and purposes, as A. might or could hold and enjoy the same," and covenanted that he had "good and lawful right to bargain and transfer the premises as is above written," and that the same were free from all arrearages of rent and other encumbrances, &c.

B. was afterwards evicted.

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by a title paramount to that of the landlord.

It was held, that the covenant was qualified and limited to the acts of the defendant himself, and did not amount to a warranty of the landlord's title.

title, the said *John Livingston* entered on the premises, and ejected the plaintiff from his possession.

The defendant craved *oyer* of the lease, and the deed of the defendant, which were set forth, and then demurred to the declaration of the plaintiff.

The deed as set forth, stated "that the said *J. Killmore*, the *within-mentioned lessee*, for and in consideration, &c., bargained, &c., to have and to hold," &c., "*in as ample a manner, to all intents and purposes, as I might or could hold or enjoy the same*," subject, nevertheless, to the rents and covenants, &c., "and further that I do covenant with the said *P. K.* that I have good and lawful right, to bargain and transfer the said premises, *as is above-written*," &c., "and that the same are clear of all arrearages of rent, or other encumbrances," &c.

Van Buren, in support of the demurrer, contended, that the covenant of the defendant extended only to his own acts, and not to the title. It was a qualified and limited, not an absolute and general covenant.

E. Williams, contra.

Per Curiam. This was a qualified covenant, and is to be confined to the acts of the defendant himself. He sold the estate in as ample a manner, to all intents and purposes, as he might or could enjoy the same; and he covenants that he has a right to sell the premises, "as is above written," and that the same are clear of all arrearages of rent or other encumbrances. It would be unreasonable and unjust, to suppose that the defendant meant to warrant his landlord's title. There must be judgment for the defendant.

Judgment for the defendant.

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*STEWART, JUN. *against* DOUGHTY AND OTHERS.

A. let to *B.* a farm for six years, and *A.* agreed "to render, yield and pay to *A.* the one half of all the wheat, rye, corn and other grain, raised on the farm in each year, in the bushel," &c. and it was also agreed, that either party might put an end to the lease, on giving to the other six months' notice;

THIS was an action of trespass *quare clausum fregit*, for breaking and entering the plaintiff's close, cutting down, taking and carrying away, a quantity of wheat and rye in the sheaf, the property of the plaintiff. The defendants pleaded the general issue, with notice, that they would give in evidence that the close mentioned in the declaration, at the time of the supposed trespass, was the proper close of *Daniel L. Van Antwerp*, and also, that the wheat and rye thereon growing, belonged to him, and that the defendants, as servants to the said *Van Antwerp*, and by his direction, entered and cut, and took and carried away the said wheat, &c.

The cause was tried at the *Saratoga* circuit, in *May*, 1811, before Mr. Justice *Spencer*.

The plaintiff gave in evidence an agreement dated 4th September, 1804, between *Andrew Stewart* and *Van Antwerp*,

by which the latter let a farm, including the premises, to *A. Stewart*, for six years, from the 1st *May*, 1805, or from the time of his taking the possession. By the eighth article of this agreement, *A. Stewart* stipulated "to render, yield and pay, to *Van Antwerp*, the one half of all the wheat, rye, corn and other grain, raised on the said farm, in each year, in the bushel, after deducting the seed," &c. By the twelfth article, it was agreed, between them, that either party might determine the other's right to the benefit of the agreement, "on giving six months' previous notice in writing, of such intention to the other party;" and if *Van Antwerp* gave the notice, he was to allow *A. Stewart* for preparing the ground for the seed, *and for any other extra labor, as should be assessed by indifferent persons to be chosen.

A. Stewart took possession of the farm, in *May*, 1805, and continued in possession until the last of *February*, 1809, when he removed from the premises, in consequence of a written notice from *Van Antwerp*, to quit in six months thereafter. The wheat and rye, &c., for which this action was brought, had been sown by *A. S.* on the premises, the autumn before he received the notice to quit.

A *fieri facias* was issued out of this court, against *A. Stewart*, at the suit of *John Sayles*, on a judgment entered up on the 28th *December*, 1808, for three hundred dollars. The execution was tested the 28th *November*, 1808, and made returnable the first *Monday* of *February*, 1809. Before the return-day of the execution, the sheriff, by virtue thereof, sold the right and title of *A. Stewart* to the wheat and rye in *Halfmoon*, where the premises are situated, to the plaintiff, and gave a bill of sale to him.

The advertisement and sale were made at *Ballston*, and at the time of the sale, the sheriff said, that he did know whether he had advertised at *Halfmoon*; that if he had no power to sell, it must be at the peril of the purchaser. The sheriff did not go to the field where the wheat and rye were growing, and he made no delivery of them to the purchaser. He went to the house on the farm, and levied on personal property of *A. Stewart* there. At the time of sale, he mentioned the wheat and rye as growing. They were not designated in the advertisement, which mentioned, generally, all the personal property of *A. Stewart*. The sale was in *January*, 1809.

Van Antwerp and *A. Stewart* had expressly agreed between them, that as it was impossible to ascertain the value of the wheat, rye, &c., the rights of the parties should remain, as under a former agreement.

The plaintiff, in the summer of 1809, with reapers, entered the close in question, and while they were reaping and gathering the wheat and rye, *Van Antwerp* and the defendants came into the field and drove them out, and took and carried away the wheat and rye, the value of which was proved.

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but if *A.* gave notice to *B.* to quit, he was to allow *B.* "for preparing the ground for seed, and for any other extra labor," &c.

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In the autumn of 1808, *B.* sowed the ground with wheat, rye, &c. and on the last of *February*, 1809, while the wheat, &c. was growing, *A.* gave notice to *B.* to quit, and he accordingly left the premises immediately thereafter.

By virtue of an execution against the goods and chattels of *B.* at the suit of *C.*, the sheriff, in *January*, 1809, seized all the personal property of *B.*, and sold all right and title to the wheat, &c. then growing on the farm, to *D.*, who, afterwards, in the summer of 1809, when the grain was ripe, entered on the farm to reap the wheat, and while reaping, *A.* with his servants, entered and drove him out, and took and carried away the wheat, &c.

In an action of *trespass quare clausum fregit*, brought by *D.*, it was held that *B.* had a good right to the crop, as emblements, which

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was not affected by the clause providing for a compensation to him for preparing the ground; that the sheriff's sale of this right, while the crop was on the ground, and before the notice to quit, was valid, and *D.* the purchaser, had the right of ingress, &c. to gather and carry away the crop; and this right could not be impaired or affected by *B.*'s subsequent quitting the position of the farm.

That *B.* had the interest in the whole crop, until he had separated and delivered *A.*'s proportion, the reservation being as rent; and that the whole property and interest having passed to *D.* by the sale, he might maintain trespass *quare clausum fregit.* (a)

(a) Vide *Van Rensselaer v. Van Rensselaer*, *infra*, 377. *Aus. in v. Sawyer*, 9 Cowen, 35.

After *A. Stewart* left the *locus in quo*, pursuant to the notice to quit, *Van Antwerp* put another tenant in possession of the house and part of the farm, and directed him to keep up the fence around the wheat and rye.

A verdict was taken for the plaintiff, for one hundred thirty-three dollars and fifty cents, being the value of all the wheat and rye, subject to the opinion of the court; the defendants insisting that they were, at all events, liable for no more than the value of one half.

Huntington and *Skinner*, for the plaintiff. The agreement in this case, between *A. Stewart* and *Van Antwerp*, amounted to a lease or tenancy at will. (*Woodfall*, 235. *Cruise's Dig.* tit. 9. c. 1. s. 4. 1 *Inst.* 55. a. n. 1.) As between them, therefore, *A. Stewart* was entitled to the wheat and rye, as *emblements*. The law on this subject is clear and well settled. *Woodfall*, 306. 309. 2 *Bl. Com.* 306. *Doug.* 206.)

The only question is, whether the plaintiff, in this case, can maintain trespass *quare clausum fregit*.

Van Antwerp was not interested as a *tenant in common* with *Stewart*, in the growing crop. The reservation expressed in the eighth article of the agreement is by way of *rent*. (2 *Johns. Rep.* 421, note. *Bull. N. P.* 85.)

A. Stewart, the tenant, had the right of *ingress, egress* and *regress*, for the purpose of cutting and carrying away the wheat and rye. Having an exclusive right to the growing crop, he had also a right, in that respect, to the soil. *Close* properly means an interest in the soil. Every person who has a right to the *herbage*, or *prima tonsura*, or a right to the *profits*, in exclusion of others, may maintain this action. (*Chitty on Pl.* 176—178. *Woodfall*, 619. 630. 632. *Ld. Raym.* 188. 7 *East*, 200. 5 *East*, 480. 6 *East*, 602. 3 *Burr* 1556. 1825. 1 *Saund.* 322, note 5. 5 *Term Rep.* 329.)

If, then, *A. Stewart*, the tenant, could maintain the action, the plaintiff, who purchased all his right, may maintain it. The title to wheat and corn growing is a chattel, and may be taken and sold on execution. (2 *Johns. Rep.* 418. 3 *Johns. Rep.* 216.)

If *Van Antwerp* was tenant in common of the crop with his tenant, this action would be equally maintainable. (*Chitty*, 180. *Co. Litt.* 13. 3 *Wils.* 110.)

The twelfth article of the agreement, by which it was stipulated that if *Van Antwerp* gave the notice to quit, he was to allow *A. Stewart*, for preparing the ground, &c., may, perhaps, be set up in bar of the right to *emblements*. But the tenant was to furnish the seed. The object of this special agreement was to compensate the tenant for preparing the ground, sowing the seed, and extra labor, which he could not, otherwise, recover at common law, as *emblements*; for if the lessor enters before sowing, the lessee at will is not entitled to the cost of ploughing and manuring the land. (*Co. Litt.* 55

a. *Woodfall*, 307.) This clause, therefore, could not have been intended to bar the tenant's common law right to emblements; nor can this right be barred or taken away, unless by express words. (8 *Term Rep.* 139. *Kyd on Awards*, 12—18.)

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Parker and Foot, contra. By the agreement, the interest of **A. Stewart* was determined, on receiving the notice to quit; and after he left the premises, pursuant to that notice, he could no longer maintain trespass. His only remedy is on the contract. To maintain trespass *quare clausum fregit*, the plaintiff must show a right of entry. *A. Stewart* had no such right, as against *Van Antwerp*, his landlord. Admitting that the tenant had a right to the crop, the plaintiff could only have a right to enter and take it, or to maintain an action *de bonis asportatis*, against the defendants.

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Corn growing is susceptible of delivery in no other way, than by putting the party in possession of the soil. (2 *Johns. Rep.* 56, (a *dictum* only of *Kent*, Ch. J.)

The reservation in this case was not of rent, but the tenant was to have the crop on shares. He and *Van Antwerp* were joint-owners of the crop, and might maintain trespass, as such, according to the principle laid down in *Foot and Litchfield v. Colvin*. (3 *Johns. Rep.* 216—221.) Now, to enable the plaintiff to maintain trespass *quare clausum fregit*, he must have the exclusive right to the crop.

Again, there was, in fact, no seizure of the wheat and rye, by the sheriff. *Van Antwerp* had put another tenant in possession. To maintain this action, there must be a possession, in *fact*, of the property. A general property is not sufficient. (1 *Johns. Rep.* 511. 1 *Term Rep.* 428.)

KENT, Ch. J. delivered the opinion of the court. There are several questions raised in this case, which it will be necessary to consider.

1. The first question is, whether the plaintiff be entitled, in any form of action, to recover?

The lease was determined while the crop was in the ground, and it was determined by the lessor, under the provision contained in the twelfth article of the agreement. The right to the emblements which would otherwise exist in the lessee, as the duration of his estate depended upon the will of the lessor, does not appear to be controlled or affected by the special contract of the parties. In case of the determination of the estate by the lessor, the contract provides for compensation only, "for preparing the ground for the reception of seed, or for any other *extra* labor." This preparation of the ground for the reception of seed is not necessarily a substitute for the right to the emblements, for it may apply to clearing and manuring and ploughing the ground, and these acts may have taken place long before seed time. The *common law has established a distinction in respect to this very subject of emblements, between the right to emblements and the costs

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of ploughing and manuring the ground, so that the determination of an estate at will, would give to the lessee his emblements, but not any compensation for these improvements. He might be ousted of the possession before the crop was in the ground, and wholly lose the expense of ploughing and manuring the land, though if he was ousted afterwards, he would be entitled to the emblements. (*Bro. Abr. tit. Emblements*, pl. 7. tit. *Tenant per copie de court roll*, pl. 3.) We ought to consider the compensation intended by the article for such a case as this, and not as an equivalent for the crop itself. The doctrine of emblements is founded on the clearest equity and the soundest policy, and ought to receive a liberal encouragement. Compensation for *preparing the ground for seed* is not an indemnity for the loss of the crop, which includes the loss of the seed, the labor of sowing and nursing it, and the hopes, to the laborer and his family, of a fruitful harvest.

While the crop was in the ground, and before notice to quit, it was sold by the sheriff under an execution against the lessee, and the plaintiff became the purchaser. This was a valid sale, and the purchaser became entitled to the right of *ingress*, &c. to gather the crop. He succeeded to all the interest of the original lessee in the crop sown, and so the law was understood by this court, in the case of *Whipple v. Foot*. (2 *Rep.* 423.) The subsequent act of the lessee, in abandoning the premises, soon after notice was given, did not impair or affect the purchaser's right which had already vested. Quitting the premises was not injurious to the lessor. He lost no rent by it. It was in furtherance of his wishes, and in obedience to his notice; and if the lessee had continued in possession for the whole six months, he would probably have been an injury to the farm, by preventing its improvement the ensuing season. His prompt abandonment of the premises was no injury, and no reason why he should lose his emblements, even if we were to admit that he had it in his power, by this means, to affect the purchaser's interest. The lessor himself did not intend by the notice, to deprive the lessee of the crop already sown, for the six months would not have expired until after harvest. The plaintiff, therefore, appears to have had a clear right and title to the emblements, at the time they were gathered by the defendants.

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*2. The next question is, whether the plaintiff is entitled to recover the whole or only a moiety of the crop. This will depend upon the question, whose property the grain was before a moiety was delivered to the lessor. By the eighth article of the agreement, the lessee was to "render and yield and pay to the lessor the one half of all the wheat, rye, corn and other grain, raised on the farm, in each year, in the bushel, after deducting the seed, and also the one half of the butter and cheese," &c. and by the ninth article he was to deliver

such a proportion of hay, &c. But here was a lease for five years, and the articles of agreement expressly declared, that *Van Antwerp* "rented and hired, and suffered the lessee to possess and enjoy the farm, and gave him the quiet and uninterrupted possession," &c. An interest in the soil passed, and the lessee would have been entitled to an action of trespass, for any unlawful entry upon it; the proportion of the productions of the farm which the tenant was yearly to render, was a payment of rent in kind. They were not tenants in common in the crops and productions raised. The interest and property in the crops was exclusively in the tenant, until he had separated and delivered to the lessor his proportion. It might as well be said that the lessor would have been tenant in common in the crop, though he was to receive only every tenth bushel of grain as a rent. The interest in the *whole* crop, therefore, passed to the plaintiff.

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3. The only remaining question is, whether the plaintiff is entitled to an action of trespass *quare clausum fregit*, for the loss of the crop. As he had an exclusive interest, I think the action will lie. The case of *Crosby v. Wadsworth* (6 East, 602) was an action of trespass *quare clausum fregit*, and the Court of K. B. held that the action was proper if the plaintiff had made out his alleged interest, which was to the exclusive enjoyment of a growing crop of grass, and to the right to cut and carry it away. The general language of the authorities is to this effect, that the grantee *vestura terræ*, or *herbagii terræ*, may maintain trespass, though he has not the soil. (Co. Litt. 4. b. Com. Dig. tit. *Trespas*, B. 1.) There are numerous authorities which support the general position, and which are referred to in *Crosby v. Wadsworth*, and in 1 Chit. on Plead. 176, 177.

The court are, accordingly, of opinion, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

*OUSTERHOUT against DAY.

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THIS was an action of *assumpsit* by the plaintiff, as sheriff, to recover his fees for serving writs of *cap. ad. resp.* issued by *T. P. Grosvenor*, attorney for the defendant. The plaintiff served several writs, in which the present defendant was plaintiff, and *Grosvenor* the attorney. The plaintiff kept a book in which he charged his fees to the attorneys who issued the process; and in the present case he charged his fees to *Grosvenor*, to whom he afterwards presented a bill of the fees, and demanded payment. *Grosvenor* neglecting to pay the bill, the plaintiff brought an action against him, and recovered judgment, which remained unsatisfied.

A sheriff may look to the attorney in the suit for his fees.

Admitting he might look to the client, in the first instance, yet if he elects to sue the attorney, without making any demand of the client, this, especially after five years have

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elapsed before
any such de-
mand is made,
is a waiver of
his right to call
on the client.
(a)

The plaintiff had collected money for *Grosvenor*, and retained it, giving him credit for the amount in the account. *Grosvenor* had charged, in his bills of costs, all the sheriff's fees, and received the amount. The plaintiff's demand for his fees accrued five years ago, and he did not make any demand of the defendant until a short time before the present suit.

Sudam, for the defendant, contended that the mere lapse of time before the plaintiff applied to the defendant, was sufficient to discharge him.

As to the general question of the liability of the client and attorney, the case of *Adams v. Hopkins* (5 *Johns. Rep.* 252) repels the idea of any credit being given by the sheriff to the client. At *common law*, two persons cannot be responsible for one and the same service, by an *implied* contract.

As between principal and agent, the question is, to whom the credit is given. The principle by which it is to be decided, is laid down in several late *English* cases. (1 *Campb. N. P.* 109. 2 *Campb. N. P.* 341. 344.) If goods are bought by an agent, the principle is liable to the vendor, if called upon when payment becomes due; otherwise, if the day of payment is suffered to pass by without any demand being made on the principal.

Foot, contra, insisted that as the services rendered were solely for the benefit of the defendant, he was responsible; and that *there was a difference between services voluntarily performed, and at the option of a party, and such as he was compelled by law to perform.

Per Curiam. The plaintiff, as sheriff, was entitled to look to the attorney for his fees; and, in this case, he has elected to look to him exclusively, and has given to him the whole credit. Admitting, therefore, that the plaintiff was entitled, in the first instance, to look to the client, he has here waived that right, and resorted to the attorney. Under the circumstances of the case, it would be unjust not to conclude the plaintiff by his election. The principle stated in the cases cited by the defendant's counsel is applicable. There must be judgment for the defendant.

Judgment for the defendant.

FREEMAN against ADAMS.

No action lies on the penalty of an arbitration bond, for the non-performance of an award, where the award is not made with-

THIS was an action of debt on an arbitration bond. The defendant, after craving *oyer* of the bond and condition, pleaded, 1. That the arbitrators, or any two of them, did not make an award between the parties, according to the form and effect of the condition of the bond. 2. That no award in writing was made, on or before the 1st day of *July*, 1809, after

the date of the bond, being the day limited for making the award, by the condition.

To the first plea, the plaintiff replied, that before the time limited by the condition of the bond, for making the award, to wit, on the twenty-first *June*, the time for making it was, by agreement, under the hands and seals of the parties, enlarged until the first day of *August* then next; and that the arbitrators did, after executing the bond, and after the enlargement of the time for making the award, and within the time appointed, to wit, on the 15th *July*, 1809, at, &c. take upon themselves, &c. and made an award in writing, under their hands and seals, of and concerning the premises, in the said condition mentioned; and set forth the *award*, of which the defendant had notice, &c.

There was a similar replication to the second plea. The defendant demurred to the replication, and the plaintiff joined in demurrer.

Weston and *Z. R. Shepherd*, in support of the demurrer, contended *that no action could be maintained on the penalty of an arbitration bond, where the award was not made within the time originally limited by the condition of such bond; but that if any action would lie, it must be on the new agreement for enlarging the time of making the award, the first agreement having expired by efflux of time. They cited 3 *Term Rep.* 592. *Brown v. Goodman*, in note. *Tidd's Pr.* 756.

Skinner and *Van Buren*, contra, insisted that the objection was purely technical, and ought not to prevail, unless supported by good authority. The case of *Brown v. Goodman* was from manuscript, and no other case is to be found in the books to support the doctrine. In *Evans v. Thompson*, (5 *East*, 189. 8 *Term Rep.* 87,) it was decided merely, that the new agreement virtually incorporated the antecedent agreements of the parties. By the enlargement of the time, the second is substituted in the place of the first, and the parties stand in *statu quo*, on the original agreement. (*Kyd on Awards*, 138. 3 *Bro. Ch. Cas.* 358.)

The action must be on the original agreement, and the enlargement of the time or new agreement comes out in the replication; as where the statute of limitations is pleaded, the new promise is stated in the replication. The time of performance of the condition of a bond or written contract may be enlarged by *parol*. (*Keating v. Price*, 1 *Johns. Cases*, 22. *Gilbert v. Fleming*, 3 *Johns. Rep.* 528.)

Again, it may be observed that in *Brown v. Goodman*, it does not appear whether the agreement to enlarge the time was before or after the expiration of the time mentioned in the condition of the bond. Here it was made before the expiration of the time first limited.

Per Curiam. The single question presented by the pleadings is, whether an action will lie upon the penalty of an arbi-

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in the time specified in the condition of the bond; though the parties, by an agreement under their hands and seals, had enlarged the time for making the award, and the award was made within such enlarged time. The proper remedy is on the submission implied in

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the agreement to enlarge the time. (a)

(a) Where the declaration charges that the parties stipulated by deed to perform a specific thing on a certain day, evidence that the time was enlarged does not support the declaration. The plaintiff must prove the contract as laid; otherwise the defendant has no notice of what he is called upon to answer. *Little v. Holland*, 3 *T.R.* 590. Vide *Frost v. Everett*, 5 *Cowen*, 497.

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tration bond, for the non-performance of an award, when it appears that the award was not made within the time specified in the bond, and when it appears that the parties, by an agreement under their hands and seals, endorsed on the bond, had enlarged the time, and that the award was made within such enlarged time. The case of *Brown v. Goodman*, (E. 29 G. K. B. cited in a note to 3 *Term Rep.* 592,) is a solemn determination of the K. B. upon the very point, and made after argument upon demurrer. By that decision, a suit will not lie upon the bond. The party has another remedy upon the submission implied in the agreement to enlarge the time. This case has been since considered *as sound law; (*Tidd's K. B.* 756. 5 *East*, 191;) and as the principle is incontrovertible, it must govern this case. The case of *Philips v. Rose* (8 *Johns. Rep.* 392) is an authority in this court to show that if a contract be subsequently changed, you must declare otherwise than on the contract itself. There is a wide difference between this case of a suit to enforce the bond, in consequence of such agreement, and a plea of a discharge by the obligee from a strict and literal compliance with the obligation, according to the doctrine in *Fleming v. Gilbert*. (3 *Johns. Rep.* 528.)

Judgment for the defendant.

ADAMS against FREEMAN.

A submission having been made a rule of court, A. sued out an attachment against B. for not performing the award, returnable on the 29th of May, which was, on that day, delivered to the sheriff, who arrested B. on the 31st May, and the parties appeared at court, on the 1st June, and the cause was put off to the next term.

In an action of trespass and false imprisonment, brought

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by B. against A., it was held, that it was lawful for the

THIS was an action of trespass and false imprisonment. The defendant pleaded, 1. *Not guilty*. 2. That on the 11th May, 1809, the parties submitted all differences to arbitrators, (see *ante*, p. 115,) so that the award should be made on or before the 1st July, 1809. The time was enlarged to the 1st August, and, before that time, an award was made, to wit, on the 15th July. The bonds contained an agreement, that the submission should be made a rule of court, pursuant to the act of 28th February, 1791, [2 R. S. 541 sec. 1]) of the Court of Common Pleas of Washington county. The plaintiff having made default in performing the award, the defendant filed the bond, award, &c. and on the 29th December, 1809, caused the submission to be made a rule of court. After service of a copy of the rule, the plaintiff having neglected to perform the award, the defendant, on the 29th May, 1810, obtained a rule for an attachment against the plaintiff. An attachment was accordingly issued, tested in March, 1810, and returnable the last Tuesday of May, (the 29th,) which was delivered to the sheriff on *the 29th May, who, afterwards, and before the return thereof, arrested the plaintiff, to wit, on the 31st May, and kept him in custody until the 1st June, when the court postponed the cause until the last Tues-

day in *August*, 1810; and the sheriff again had the plaintiff in custody, before the court, on that day, and detained him, until he was discharged from the attachment, by order of the court. The plaintiff demurred to this plea, and the defendant joined in the demurrer.

Weston and *Z. R. Shepherd* argued in support of the demurrer.

Skinner and *Foot*, contra.

Per Curiam. The plaintiff was attached and imprisoned under the statute, (*Laws*, vol. 1. 156,) for refusing or neglecting to perform the award; and the statute makes the party, in such case, "subject to all the penalties of contemning a rule of court." [2 *R. S.* 544. sec. 18.] The irregularity contended for on the part of the plaintiff is, that he was arrested on the attachment, on the 31st of *May*, being after the return-day. The attachment was returnable on the 29th of *May*, and on that day, the defendant avers that he delivered the process to the sheriff. It was lawful for the sheriff to have arrested the plaintiff on the return-day, and it does not appear that the defendant gave any direction to have him arrested afterwards. The trespass (if any) was, therefore, committed by the sheriff, and not by the defendant; and it does not appear that the defendant even knew, at the time the plaintiff was detained a prisoner, that he had been arrested after the return-day. There is no law or justice, that a party who sues out and delivers to the sheriff a valid process, should be responsible for the irregularity of the sheriff in executing the process, unless it appear, affirmatively, that the sheriff acted under his orders, when he committed the trespass. The party who sues out process from a competent court, is responsible only for the validity of the process, and for good faith in suing it out. He is not to answer for the acts of the officer, beyond the authority of the precept, unless he makes those acts his own. The doctrine of a ratification of a trespass committed without the authority of the party ratifying, does not seem to apply. It may be questionable, whether an assent, afterwards, to a trespass, will make the party assenting a trespasser *ab initio*, in cases of mere personal tort. (*Bishop v. Viscountess *Montague*, *Cro. Eliz.* 824.) But, at any rate, the assent must be clear and explicit, and founded on full knowledge of the previous trespass. There is no evidence here of any such assent, and the plaintiff should have replied and averred that assent, if he would avoid the plea. The appearance of the plaintiff in court, on the 1st of *June*, was no evidence that he was arrested, after the return-day; and if the defendant had been informed of it, he had a right to consider the plaintiff as waiving the objection to the time of the arrest, since he submitted to it, by making no application

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sheriff to arrest the party, on the return-day of the attachment, and no direction having been given to him by A. to make the arrest, afterwards, the trespass, if any, was committed by the sheriff, not by A.

A party who sues out and delivers to the sheriff a valid process, is not responsible for any irregularity of the sheriff in executing the process, unless it appear, affirmatively, that he acted by the orders of the party, when he committed the trespass. The party is answerable only for the validity of the process, and for good faith in suing it out.

Whether an assent to the trespass, afterwards, by the party, will make him a trespasser *ab initio*, *du bitatur*. But, if so, such assent must be

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clear and explicit, and founded on full knowledge of the trespass.(a)

(a) If a sheriff levy an execution after the return-day by the direction of the plaintiff and his attorney, they are all trespassers. But the plaintiff and his attorney are not liable for not countermanding an execution after the return-day. *Vail v. Lewis*, 4 *Johns. Rep.* 450.

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to the court to be discharged, and by acquiescing in a continuation of the imprisonment, or effect of the arrest, until the subsequent term of the Court of Common Pleas. The plea is, therefore, a sufficient bar to the action; and without touching any other question that was raised, the defendant is entitled to judgment.

Judgment for the defendant.

WASHBURN *against* THE OVERSEERS OF THE POOR OF HEBRON.

On appeals in cases of *bastardy*, the general sessions of the peace have no power to award costs unless authorized by statute; and no such authority existed under the act of the 6th March, 1801. The act of 30th March, 1810, (*sess. 24. c. 109.*) does not apply to appeals brought before the passing of the act.
(a)

THIS was an *appeal*, by *Thomas Washburn*, from an order of two justices, made under and by virtue of the act, entitled "An act for the relief of cities and towns from the maintenance of bastard children," passed 6th *March*, 1801. The order was made on the first day of *May*, 1809, and the appeal entered at the then next general sessions of the peace, held in and for the county of *Washington*; and at the *August* sessions, in 1810, the order was quashed; at the then next general sessions of the peace, in *December* thereafter, the appellant moved for *costs* against the appellees, which the court granted. The only question was, whether the appellant was entitled to costs.

Crary, for the defendants, contended, that the statute gave no costs in this case, and, by common law, no costs are allowed.

Again, the court having quashed the order without costs, could not review their decision, afterwards, and grant costs. *Cro. Car.* 350. *Burr. Sett. Cases*, 194. 2 *Johns. Rep.* 251. 1 *Caines' Rep.* 129.

[*120] *Skinner*, contra. If the order had been affirmed, the party *would have been entitled to costs under the act. Where one party can recover costs, the other may also. (*Sess. 24. c. 170. s. 1. and 2. sess. 24. c. 18. s. 5.*)

Crary, in reply, observed, that by a late statute, (*sess. 33. c. 109. s. 3.*) the legislature had allowed costs on appeals of *bastardy*, which shows, in their opinion, that no costs were allowed under the former statute.

Per Curiam. There was no statute provision, authorizing the sessions to award costs in any case of *bastardy*, brought before them, under the act of 1801. (*Laws*, vol. 1. 194.) The provision in the act of 30th *March*, 1810, c. 109, does not apply to cases of appeal, brought before the passing of the act, and unless the sessions are authorized specially by statute, to award costs, they have no authority to award them. The quarter sessions in *England* have no authority, to this day, to award costs in cases of this nature. (*King v. Sweet*, 9 *East*, 25.) In this case, then, none were to be awarded.

(a) 1 R. S.
647—650. sec.
24—38.

KEITH *against* JONES.

THIS was an action of *assumpsit*. The declaration contained several counts. The first was on a promissory note, under the statute, dated the 17th *May*, 1810, by which the defendant, for value received, promised to pay the plaintiff or bearer, forty-four dollars, by the first day of *October* next, with use, to be paid in *York* state bills or specie. The other counts were for goods sold and delivered, money paid, money lent, &c.

The defendant demurred to the declaration.

Foot, in support of the demurrer, cited 1 *Rev. Laws*, 229. [1 *R. S.* 768, sec. 1—4.] *Chitty on Bills*, 17. 34.

Sedgwick, contra.

Per Curiam. The first count in the declaration, and to which there is a general demurrer, is good. The note therein stated is a negotiable note, under the statute; and being declared to be payable *in *York state bills or specie*, is the same thing as being made payable in lawful current money of the state; for the bills mentioned mean bank paper, which is here, in conformity with common usage and common understanding, regarded as cash.

Judgment for the plaintiff.

(a) So a promissory note payable "in bank notes current in the city of New-York," is a negotiable note within the statute. *Judah v. Harris*, 19 *Johns. Rep.* 144. But a note payable "in Pennsylvania or New-York paper currency, to be current in the state of Pennsylvania or state of New-York," is not a promissory note for the payment of money under the statute. *Leiber v. Goodrich*, 5 *Coen*, 186.

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A note payable to *B.* or bearer, in *York state bills or specie*, is a negotiable note under the statute; and may be declared on as such. (a)

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BERRY *against* ROBINSON.

THIS was an action of *assumpsit*, on a promissory note, dated the 25th *August*, 1803, made by one *J. B.* for fifty-six dollars, payable to the defendant or his order, in one year after date, with interest. The declaration stated that the defendant, before the payment of the money mentioned in the note, or any part thereof, and after the time appointed by the note, for the payment thereof had elapsed, to wit, on the 17th *May*, 1808, for value received, endorsed the note, and thereby appointed the contents of the note to be paid to the plaintiff, &c. That the maker had not paid the money, but had refused to pay the same, whereof the defendant, afterwards, to wit, on the 12th *October*, 1810, and after the said note was so endorsed, had notice. By reason whereof, &c. Plea, *non assumpsit*.

The cause was tried before Mr. Justice *Yates*, at the *Montgomery* circuit, in *September*, 1811. The plaintiff proved the endorsement of the defendant, dated, as stated in the declaration, on the 17th *May*, 1808; but did not prove that he had ever demanded payment of the maker, or had ever

Where a promissory note, payable to order, was endorsed five years after it was due, it was held, that the endorsee was bound, notwithstanding, to prove a demand of payment from the maker, and notice to the endorser. There is no difference, in this respect, whether the note is endorsed before or after it is due.

The demand and notice, in every case, where a drawer exists, is an implied condi

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tion of the con-
tract or en-
dorsement. (a)

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given notice of non-payment to the defendant, or that he meant to look to him, as endorser. The judge directed the plaintiff to be called and nonsuited.

A motion was made to set aside the nonsuit, and for a new trial.

Cady, for the plaintiff, contended that where a note was negotiated after it was due, or dishonored, the holder was not bound to demand payment of the maker, and give notice to the endorser, but might sue him immediately. Where a note is negotiated after it is due, the endorsee takes it altogether on the credit of the endorser; it is the same as a new note by the endorser. (*Brown v. Davis*, 3 Term Rep. 80. See 5 Johns. Rep. 118.) *The reason of a demand of payment of the maker, and notice to the endorser, does not apply to this case. The general rule is dispensed with in cases of bills of exchange, where the drawer has no effects in the hands of the drawee. (3 Bos. & Pull. 239. 1 Caines' Rep. 157.)

In *Porthouse v. Parker*, (1 Camp. N. P. 82,) a bill was drawn by a firm, on one of the partners, and accepted by him; and in a suit against the drawers, it was held, that the exceptor being one of the drawers, there was no occasion to show any express notice to the drawers of the dishonor of the bill. In the present case, the defendant knew the note was dishonored, as he endorsed it long after it was due. If there is no express authority against the plaintiff, the reason of the case is in his favor.

Henry, contra, insisted, that the endorsement was merely an order on the maker to pay the amount of the note to the plaintiff; and it necessarily involved a duty on the party to go and demand the money of the maker. A bill negotiated, after it is due, is equivalent to a bill payable at sight. Acceptance of a bill may be after the day of payment, and which may be negotiated, and may be so declared upon. (1 Lord Raym. 574.) The necessity of a demand of payment and notice to the endorser exists, and is indispensable.

Per Curiam. The plaintiff was properly nonsuited, for not proving demand of payment on the maker, and notice of his default to the endorser. Though the note was endorsed long after it was due, yet the endorsee took it subject to this condition. The books make no distinction, on this point, whether a note be endorsed before or after it is due. The endorsement, in every case, where a drawer really exists, is a conditional contract to pay in the event of a demand, or due diligence to make a demand on the maker, and his default. It was equivalent in this case to an order on the drawer to pay the amount. The motion to set aside the nonsuit is denied.

Motion denied.

(a) A note transferred after it is due is to be considered payable on demand; and the demand and notice must be made in a reasonable time. *Van Hoesen v. Van Alstyne*, 3 Wendell, 79. Where a note is negotiated after dishonor, the demand and notice given by the holder enures to the benefit of the subsequent endorsee. *Williams v. Matthews*, 3 Cowen, 252.

*WOODS, ADMINISTRATOR, &c. *against* WILLIAMS,
EXECUTOR, &c.

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May, 1812.

WOODS
v.
WILLIAMS.

THIS was an action of covenant. The plaintiff declared on an instrument alleged to have been executed by the defendant's testator, dated 1st *September*, 1787, and by which the testator agreed to give the intestate, her heirs and assigns, the sum of one hundred and fifty pounds, in lands, on or before the first *January* then next, if the same should be demanded; the plaintiff averred that the instrument was lost by accident. The defendant pleaded, 1. *Non est factum*; 2. That no demand was made of the testator, according to the form and effect of the instrument.

The cause was tried at the *Albany* circuit, in *October*, 1811, before Mr. Justice *Van Ness*. At the trial, *David Thomas*, the husband of the intestate, was offered as a witness, and objected to as interested. To obviate the objection, the witness executed a release, under his hand and seal, whereby, for the consideration of one dollar, he released to the plaintiff "all his right, &c. to any sum or sums of money which might be recovered in the said cause."

The defendant's counsel objected to the sufficiency of the release, on the ground that there was no subject matter between the witness and the plaintiff, on which it could operate. This objection was overruled, and the witness admitted. The witness proved, that the testator acknowledged the execution of the instrument, of which he produced a copy. He also proved a demand on the testator, and the loss of the original paper. And a verdict was found for the plaintiff, for nine hundred and ninety-nine dollars and fifty-two cents.

A motion was made to set aside the verdict, and for a new trial.

Z. R. Shepherd, for the defendant, contended that there was no present or subsisting interest in the witness, which could be released, so as to render him competent. His right was future and contingent. The witness was entitled to the administration of his wife's estate, and would be entitled to the money when recovered. (6 *Johns. Rep.* 112.) If he was eventually to receive the money, he would be interested in favor of the plaintiff. If the suit was lost; it was the loss of the witness, not the plaintiff. The witness was, in fact, the *cestuy que trust*. He clearly had such an interest as rendered *him incompetent to be a witness. But it was not such an interest as could be released. A party may release a covenant, but not the damages, until the covenant is broken.

A mere possibility cannot be released. (*Cro. Eliz.* 552. 2 *Roll. Abr.* 404, 405. *Cro. Jac.* 337. 1 *And.* 133. 1 *Roll. Rep.* 11. *Cro. Eliz.* 173. 600. *Owen*, 85. 1 *Leon.* 167. 3 *Leon.* 256. *Dyer*, 244. 10 *Co.* 48. 51. 3 *Esp. Rep.* 25.

A. administrator of B. brought an action on a covenant, for one hundred pounds &c. and at the trial, C. the husband of the intestate, was offered as a witness, on the part of the plaintiff, and being objected to as interested, in consideration of one dollar, he executed a release to the plaintiff "of all right, &c. to any sum or sums of money which might be recovered in that cause."

It was held, that C. had an interest in the subject matter of the suit, which might be released, and that the release which he executed, was sufficient to extinguish his interest, so as to render him a competent witness.

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3 *East*, 7. *Co. Litt.* 292. b. *Cro. Eliz.* 580. 5 *Co.* 706 2
Wils. 376. *Yelv.* 192. 215.)

If bail are released before the principal is charged, the plaintiff may go on, afterwards, and charge the bail. To render a release operative, it must be of a present, vested and subsisting interest.

Again, the release is not sufficient for want of a consideration. A court of equity, on that ground, would relieve against it.

Russell, contra, said, that as no objection was made at the trial, to the form of the release, none could be made here. The only question was, whether the interest of the witness could be released, in any possible form.

The witness had a right, on the death of his wife, to the money, and the plaintiff was merely a trustee.

A possible or contingent interest may be released. (*Com. Dig. Release.* (B. 1.) (B. 3.) *Co. Litt.* 265. a.) And if the person to whom the release is made, cannot take the thing released, it will operate by way of extinguishment. (*Com. Dig. Release.* (B. 6.) *Co. Litt.* 276. a. 279. b.)

In the case in 10 *Co.* 48, more fully reported in *Cro. Eliz.* the question was as to the form of the release. It was not denied that the subject was capable of being released. The same observation may be made, as to several other cases cited by the defendant's counsel.

Again, if the witness has done all in his power to get rid of his interest, it is sufficient; for the objection proceeds on the ground of a supposed *bias* on the witness's mind, and which is removed by the release. (*Peake on Ev.* 158. *Doug.* 139. 2 *Stra.* 1253.)

The court would not, in the exercise of their discretion, grant a new trial, in such a case, on the ground of a mere technical objection.

It makes no difference, as to the competency of a witness, whether the interest of the witness is real or imaginary, if there is a bias on his mind; (3 *Johns. Rep.* 428;) so the removal of the bias ought to render him competent.

Van Vechten, in reply, observed, that if, notwithstanding the release, the party would be liable, the release was inoperative. This is a release of all money which may be recovered in the suit; if it had been a release of the instrument itself, it might have been sufficient. Here it is a release of an accountability, before *the existence of the subject matter on which the accountability is to arise. There is nothing on which the release can operate.

Again, if *Thomas* assented to granting the administration to *Woods*, then he would be liable to all costs prior to the release, in case a verdict should be found against *Woods*.

Per Curiam. The only question in this case is, whether *David Thomas* was a competent witness, after the execution

of the release by him; (as stated in the case,) "of all right, title, interest, property, claim and demand to any sum or sums of money which may be recovered in the cause." This release was objected to at the trial, on the ground, that no subject matter existed between the witness and plaintiff, or otherwise, upon which the release could operate. Upon the argument, the objection was urged more against the form than the substance of the release. It ought, however, to be viewed as made at the trial to the substance of the release, for had it related to the mere form of it, that could have been removed at the time; and this seems to be the established rule in such cases. (*Doug.* 136.) The objection at the trial was, that the nature of the interest was such that it could not be released. Such a kind of interest may, no doubt, exist; (*2 Johns. Rep.* 176. *8 Johns. Rep.* 429;) but this is not of that description. If the witness had any beneficial interest in the subject matter of the suit, this release would extinguish it. It is a forced construction to consider it a release of a future and contingent interest merely. It is a release of all interest or benefit to be derived from that suit, and in this point of view also it is sufficient, for this is the only interest necessary to be extinguished. The question as to the interest of a witness is, *whether he is to gain or lose by the event of the cause.* A release technically operates only upon a present interest; but when there is a present right, to take effect *in futuro*, such a right may be presently released. (*Co. Litt.* 265. a.) The case before us is one of that description. The interest of the witness was a present subsisting interest, and the reducing it to possession was the only future contingency attending it.

Thomas was, therefore, a competent witness, and the motion for a new trial ought to be denied.

Motion denied.

*GREENBY *against* CHEEVERS.

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IN error, from the Court of Common Pleas of *Jefferson* county. The plaintiff below, *Cheevers*, declared in *assumpsit*, for money paid, &c. money lent, &c. and money had and received, &c. The defendant below pleaded *non assumpsit*.

At the trial of the cause, the plaintiff gave in evidence an agreement, dated the 14th of *September*, 1803, by which *Greenby* agreed to sell and convey, by a good and sufficient deed to *Cheevers*, a certain piece of land, at three dollars per acre, if *Cheevers* should do and perform his promise, contained in the same agreement, which was to pay *Greenby* four hundred sixty-eight dollars and seventy-nine cents, to wit, one hundred dollars on the 1st *January*, 1805, and one hundred dollars on the 1st *January*, 1806, and the residue in two annual instalments; *Greenby* agreed to give the deed on the

In *September*, 1803, *A.* contracted to sell and convey to *B.* a certain piece of land, for which *B.* was to pay 468 dollars, 100 dollars on 1st *January*, 1805, 100 dollars on the 1st *January*, 1806, and the residue in two years thereafter, and the deed was to be executed when one half of the

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purchase-money was paid, &c.

At the time of the contract there was a prior mortgage on the land from A. to C. dated Feb. 1802, duly registered in July, 1802, for securing the payment of a sum of money in five annual instalments. B. having paid to A. 83 dollars on the contract, brought an action of *assumpsit* to recover back the money, on the

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ground of fraud. It was held that the mere fact of the existence of the mortgage at the time of the contract was not evidence of fraud, so as to vacate the agreement, and give B. a right to disaffirm it; for it might be that A. would have paid off the mortgage before the time when he was to convey to B. so as to give him a good title. And B. at least, ought first to have paid the one half of the purchase-money, and put himself in a condition to demand a deed, before he charged A. with a default. (a)

payment of one half of the purchase-money, subject, however, to a mortgage for the security of the remainder.

The plaintiff also gave in evidence a mortgage, dated 22d February, 1802, and registered 23d July, 1802, from *Greenby, Joseph Wilcox, and Elihu Gillett*, to *Daniel M' Cormick and Charles Smith*, which covered the same land, for securing the payment of 7,620 dollars, in five annual payments. The plaintiff also proved, that he had, at different times, paid to the defendant on the contract, eighty-three dollars and thirty-six cents, including interest.

On this evidence the defendant's counsel moved for a nonsuit, which was overruled by the court below, who were of opinion that, the land being encumbered by the mortgage to *M' Cormick and Smith*, the plaintiff had a right to disaffirm the contract, and bring this action to recover back the money he had paid; and that the evidence should go to the jury, to show the fraud of the defendant. The jury accordingly found a verdict for the plaintiff, for eighty-three dollars and thirty-six cents.

The counsel for the defendant tendered a bill of exceptions to the opinion of the court below, on which the writ of error was brought to this court.

*The case was submitted to the court without argument.

Per Curiam. The mere fact of the existence of the mortgage at the time the plaintiff in error entered into the contract, was not evidence of fraud, so as to vacate the agreement. The mortgage was upon record and open to the knowledge of *Cheevers*. *Greenby* did not agree to convey until one half of the purchase-money was paid, and one half of it would not be due and payable until the 1st of May, 1806. By that time, the mortgage would have been due and payable, and it is to be presumed that *Greenby* would then have put himself in a capacity to convey a good title. He was careful not to contract to convey until the arrival of the time when he was to pay up the mortgage. If *Cheevers* had waited until half of his purchase-money was due, and had then offered to pay it on receiving the deed, and *Greenby* had then been incapacitated to convey, by the outstanding mortgage which he had omitted to redeem, there might have been ground to consider the contract as at an end, and rescinded. But *Cheevers* had paid but eighty-three dollars and thirty-six cents, and had never put himself in a condition to demand a deed, nor to charge *Greenby* with a default. The case has no analogy to that of *Van Benthuyzen v. Crapser*. (8 Johns. Rep. 257.) The plaintiff below showed no right of action, and the judgment must be reversed.

(a) Vide *Judson v. Wass*, 11 Johns. Rep. 525. *Tucker v. Wood*, 12 Johns. Rep. 190. *Ellis v. Hoskins*, 12 Johns. Rep. 363. *Fuller v. Hubbard*, 6 Cowen, 13.

LANSING against PRENDERGAST.

NEW-YORK,
May, 1812.LANSING
v.
PRENDER-
GAST.

THIS was an action of *covenant*, for the recovery of seven years' rent, brought upon a durable lease, executed by the plaintiff to the defendant, on the first day of *March*, 1793, for a lot of land in *Lansingburgh*, in which lease the yearly rent of four pounds was reserved to be paid yearly and every year, for ever thereafter; and which rent the defendant, his executors, administrators and assigns, expressly covenanted by the lease, to pay to the plaintiff, his heirs and assigns, for ever. The plaintiff in his declaration averred, that there was due from the defendant the sum of twenty-eight pounds for seven years' rent due and in arrear, on the first day of *March*, 1810.

A discharge under the insolvent act is no bar to an action on an express covenant to pay rent, brought to recover rent accruing subsequent to the insolvent's discharge. (a)

The defendant pleaded *non est factum*, and gave in evidence, at the trial, (according to a notice given for that purpose,) a discharge *obtained under the act entitled "An act for giving relief in cases of insolvency," dated the 17th day of *October*, 1801, by which the defendant was discharged from all debts up to the date of the discharge; and that the said lease was duly assigned among other property of the said defendant, to his assignees, appointed by the authority of the act. It was admitted, on the trial, that the plaintiff, on the 10th day of *September*, 1810, recovered a judgment against the defendant, before a justice of the peace, for the sum of twenty dollars, for two years' rent, due on the lease, the 1st day of *March*, 1803.

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The cause was tried at the *Albany* circuit, in *October*, 1811, and a verdict taken for the plaintiff, subject to the opinion of the court on the above case, which was submitted to the court without argument.

Per Curiam. There is no distinguishing this case, in principle, from that of *Frost v. Carter*. (1 *Johns. Cas.* 73.) The rent now sued for had not accrued at the time of the discharge. Rent afterwards to accrue and grow due, could not, in any sense, be considered as a present debt, at the time of the insolvent's assignment, and for which the plaintiff might have become a petitioning creditor. It must be *debitum in presenti*, though it be *solvendum in futuro*. A discharge under the *English* acts of bankruptcy, or of insolvency, has never been considered as a bar to an action of covenant on an express covenant to pay rent. (1 *H. Bl.* 433. 4 *Term Rep.* 94. *Auriol v. Mills*, 8 *East*, 318. *S. P. Cotterel v. Hooke*, *Doug.* 97. *Marks v. Upton*, 7 *Term Rep.* 305.) The words of the bankrupt act of 7 *Geo. I. c.* 31, are nearly the same as those in our insolvent law. The recovery before the justice was no bar to rent not included in that suit. Each sum of annual rent was a distinct debt.

(a) If the creditor at the time of the assignment by the insolvent debtor, has not a certain debt due or owing, to which he can attest by oath, so as to entitle him to a dividend of the insolvent's effects, he will not be barred by the discharge. *M. & F. Bank v. Capron*, 18 *Johns. Rep.* 467. An insolvent discharge does not affect debts contracted after the time of presenting the petition. *M^r. Neilly v. Richardson*, 4 *Cowen*, 607. Vide *Hodges v. Chace*, 2 *Wendell*, 248.

Judgment for the plaintiff.

NEW-YORK,
May, 1812.

JACKSON
v.
VOORHIS.

*JACKSON, *ex dem.* LIMERICK AND ANOTHER *against*
VOORHIS.

Where money is loaned on mortgage, by the loan officers, pursuant to the act of 14th March, 1792, (sess. 15. c. 25,) after a default of payment of interest by the mortgagor, for 22 days after the same is payable, all equity of redemption is forever foreclosed, *ipso facto*, by such default; and the loan-officers become vested with an absolute and indefeasible estate in the land, so that this court cannot regard any estate as existing in the mortgagor. (a)

THIS was an action of ejectment. The cause was tried at the *Greene* circuit, in 1811, before Mr. Justice *Spencer*. The plaintiff proved that *Mary Limerick*, one of the lessors, was the widow, and the other lessor, the infant daughter of *Isaac Limerick*, deceased, who owned the premises in question, at the time of his decease, and that the defendant took possession after his death.

The defendant produced a mortgage from *Joseph Adams*, under whom *Isaac Limerick* claimed, of the premises in question, in *September*, 1810, to the loan-officers of the county of *Albany*, to secure the payment of two hundred pounds, which contained a covenant, on the part of *Adams*, that he, his heirs and assigns, should be absolutely barred from all equity of redemption, after twenty-two days after failure of the payment of the interest. It was proved that the interest which fell due on the first *Tuesday* of *May*, 1810, not being paid, the premises were advertised, under the act of the legislature, passed the 14th *March*, 1792, (sess. 15. c. 25,) and sold to *Thomas Limerick*, in *September*, 1810. This evidence was objected to, as arising after issue joined, and ought, therefore, to have been pleaded *puis darrein continuance*, but the judge overruled the objection. The counsel for the defendant then objected to the sufficiency of the evidence, because it did not appear that the loan-officers, in their advertisement of the sale, had pursued the directions of the act, but the judge overruled the objection, and directed the jury to find a verdict for the defendant, and the jury found a verdict accordingly.

A motion was made to set aside the verdict, and for a new trial, for the misdirection of the judge.

The case was submitted to the court without argument.

Per Curiam. At the commencement of the suit, there was a full and perfect title existing in the loan-officers. The thirteenth section of the act of the 14th *March*, 1792, (*Laws*, vol. 2. p. 288,) is decisive, and will not permit the court to regard any estate as existing in the mortgagor, after a default of twenty-two days from the first *Tuesday* in *May*, to pay the interest; for the statute declares "that the loan-officer shall then be seised of an absolute indefeasible estate in the land so mortgaged, &c., and the mortgagor shall be *utterly foreclosed and barred of all equity of redemption of the mortgaged premises," &c. The default amounted, *ipso facto*, to an absolute foreclosure, and, consequently, a complete title existed out of the lessors, at the commencement of the suit.

Judgment for the defendant.

(a) Acc. *Sherrill v. Crosby*, 14 *Johns. Rep.* 358. But see *Jackson v. Rhodes*, 8 *Coven*, 47. 1 *R. S.* 211—214. sec. 1—20. *Id.* 374. sec. 45. *Id.* 575. sec. 51.

SPENCER *against* TABELLE.NEW-YORK,
May, 1812.FIELD
v.
M'VICKAR.

PARKER, in behalf of the plaintiff, moved to strike out of the defendant's plea, in this cause, which was an action for a libel, all such parts of the plea as were a recital of the declarations in the cause of *Spencer v. Gould*, and in *Spencer v. Ward*, in this court.

Foot, contra.

Per Curiam. The two declarations set forth, *in hæc verba*, in the plea, are unnecessary and superfluous, and oppressively encumber the record. They ought, therefore, to be struck out, with costs of this motion.

Motion granted.

Where the defendant, in an action for a libel, in his plea set forth, *in hæc verba*, two declarations by the plaintiff in two other actions, the court ordered them to be struck out, as being an oppressive encumbrance on the record.

FIELD *against* M'VICKAR.

IN error, on *certiorari*, from a justice's court. *M'Vickar* sued out an attachment before the justice, against *Field* of *Cocksackie*, in the county of *Greene*, as a debtor concealed within the county, with intent to defraud his creditors, and to avoid process, &c. The attachment was regularly issued. On its return, both parties appeared, and *Field* pleaded in abatement, that before and at the time of issuing the attachment, he resided in *Cocksackie*, and had not departed nor was he about to depart, from the county, nor did he conceal himself within the same, with intent to defraud his creditors, &c., or to avoid process, &c.

Where an attachment against a concealed debtor is issued by a justice of the peace, and proceedings are regular, the justice cannot supersede the attachment, but must, on the return thereof, proceed to hear the cause, as on any other process.

The plaintiff demurred to the plea, which was overruled by the justice, and *Field* then left the court without making any further defence. The plaintiff having proved his demand, the justice gave judgment for five dollars and the costs of suit, in which were included five *subpœnas* and fees of the constable for serving them.

If a justice allows fees for *subpœnas* on more than four witnesses, the judgment will be reversed.

*It was objected, 1. That the pleas in abatement were sufficient; 2. That the costs of five writs of *subpœna* ought not to have been allowed.

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Per Curiam. The first objection cannot prevail. If the proceedings on the attachment were regular, which is not questioned in this case, the justice had no power to supersede the attachment, but must, on the return thereof, proceed to hear the cause, as on any other process.

The allowance of fees for serving *subpœnas* on more than four witnesses, is prohibited by the proviso in the twenty-fourth section of the act. We could wish to get over this objection, as the difference is only twelve cents and a half; but it is insurmountable. The judgment must, therefore, be reversed.

Judgment reversed.

NEW-YORK,
May, 1812.

BLISS
v.
BALL.

The payee endorser of a note, who has been sued by the endorsee, in default of the maker, cannot compel the maker to pay the costs of such suit. The maker is liable to the payee for the amount of the note only. (a)

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SIMPSON against GRIFFIN.

IN error, on *certiorari*, from a justice's court.

Griffin sued *Simpson* before the justice, and declared for money had and received to his use, and for money lent. The defendant pleaded *non assumpsit*. The plaintiff proved, that he had been sued as endorser of a note drawn by the defendant, and had been obliged to pay, besides the amount of the note, nineteen dollars, costs of suit. The taxed bill was produced to the justice, who gave judgment for the plaintiff, for the amount.

Per Curiam. If the endorser of a note be duly fixed, he ought to pay it, without waiting to be sued, but if he finds it more convenient to delay taking up the note, until he is prosecuted to judgment and execution, the drawer ought not to pay for that convenience. It is his own fault or misfortune that subjects him to costs, and he cannot resort to the drawer for indemnity against those costs. The mere fact of drawing the note does not imply a promise to save the payee harmless from all costs and charges that he may be subjected to, as endorser. There must be a special promise to save harmless, before the payee can call upon the *drawer for costs accrued by the default of the payee himself. As payee, he can only look to the drawer for the amount of the note. The judgment must, therefore, be reversed. Judgment reversed.

(a) Without an express stipulation a surety who has paid money for his principal cannot recover from him more than the amount paid with lawful interest, though the property of the surety has been sacrificed to raise the money. 1 *Hayward*, 130. 17 *Mass.* 169. *Aliter* where there is an agreement to save harmless. *Bonney v. Seely*, 2 *Wendell*, 481.

BLISS against BALL.

IN error, on *certiorari*, from a justice's court.

A *fi. fa.* was issued the 14th April, 1810, against A. and was delivered to the sheriff, and in April, 1811, B. purchased a cow of A. *bona fide*, without any intent to defeat the execution, which lay dormant in the hands of the sheriff, until the 25th May, 1811, when he took and sold the cow; it was held that there being no evidence of an actual levy by the sheriff on the goods and

Ball sued *Bliss* before the justice, in trespass *quare clausum fregit*, for breaking his close and taking away and converting to his own use a brindled cow. The defendant pleaded not guilty, and also that, under a writ of *fieri facias* issued out of the Court of Common Pleas of *Lewis* county, at the suit of *Nash* against *Morton*, he, as deputy sheriff, took and sold the cow, as the property of *Morton*. At the trial before the justice, it appeared in evidence, that *Bliss* did take the cow from the possession of *Ball*, who had purchased the cow, at a fair price, of *Morton*. The cow was sold by the defendant at auction, on the execution against *Morton*, on the 25th May, 1811. The *fi. fa.* issued the 14th April, 1810, on a judgment of *May* term, 1809. The cow belonged to *Morton* at the time the execution issued, and continued his property until purchased by *Ball*, in April, 1811. The defendant proved, that in 1810, *Morton* had two cows; and that he sold one of them, in November, 1811, to one *Searl*. The defendant de-

layed selling on the execution, because he was instructed that a compromise was pending. The defendant admitted that he knew of the judgment and execution when he purchased the cow. The justice gave judgment for the plaintiff.

Per Curiam. There is no evidence of an actual and specific levy on the cow in question, by the deputy sheriff, during one year after the execution came into his hands. The execution was issued in *April*, 1810, and the plaintiff below purchased the cow of *Morton*, in *April*, 1811, and during the year 1810, *Morton* owned two cows. There is no ground for an inference, that *Ball* purchased the cow with any fraudulent intent, or for the purpose of defeating the execution. He gave a fair price, and the question is, shall the simple fact of an execution, lying dormant in the sheriff's hands for a year, and without evidence of *any thing like an actual levy on the chattels, by taking an inventory, by designation or otherwise, bar a sale of a specific chattel by the debtor? To carry the *lien* so far, would be a very inconvenient check to the circulation of property. (8 *Johns. Rep.* 452.) Though the delay on the part of the sheriff may have been by agreement of the parties to the execution, and without any fraudulent intent on their part, yet third persons have a right to presume the execution satisfied, or as expired, unless the knowledge of an actual seizure be brought home to the purchaser. Here is no proof that any seizure was ever made; and upon the whole, the judgment below ought to be affirmed.

Judgment affirmed.

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POWERS
v.
LOCKWOOD.

chattels of *A.*
the sale to *B.*
was valid, and
not barred by
the execution.
(a)

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(a) But if the purchaser has notice of the judgment and buys with a view to defeat the plaintiff's remedy, the sale is void. *Wickham v. Miller*, 12 *Johns. Rep.* 320. *Stutson v. Brown*, 7 *Coven*, 732. What constitutes a valid levy under an execution. *Beekman v. Lansing*, 3 *Wendell*, 446.

POWERS against LOCKWOOD.

IN error, on *certiorari*, from a justice's court.

Lockwood brought an action against *Powers*, before the justice, for that the dog of *Powers* had killed a calf belonging to the plaintiff. Issue was joined, and the cause was then adjourned, on the motion of the defendant, from the 2d to the 9th *December*, and a jury was summoned at the request of the plaintiff. After the parties had appeared on the return of the *venire*, the defendant's attorney moved for an adjournment, on the ground of the absence of *Jonathan Howard* and another material witness, and offered to make the requisite oath and give the security. This application was made after some dispute about the right of the plaintiff to appear by attorney, and after the defendant had said that he wanted one *Parker*, as a witness, who soon after appeared. The motion was denied by the justice. Evidence was then given, on the part of the plaintiff. The jury found a verdict for the plaintiff, on which the justice gave judgment.

Per Curiam. The only question in this case is, whether

After issue joined in a cause, before a justice of the peace, the defendant obtained an adjournment for seven days, and on the return of the *venire* at the day appointed for trial, he again moved for an adjournment, on account of the absence of a material witness, and offered the requisite security; it was held, that he was not entitled to a second adjournment, on the

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usual affidavit,
without show-
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ing diligence
to procure the
witnesses, after
the first ad-
journment, or
some reason, to
the satisfaction
of the court, for
his neglect to
do so. (a)

(a) But if it
does not ap-
pear that there
has been delay
or want of due
diligence on
the part of the
defendant, he
is entitled to his
adjournment as
of right. *Hems-
tract v. Youngs*,
infra, 364. Vide
*St. John v. Ben-
edict*, 12 *Johns*.
Rep. 418.
Farrington v.
Payne, 15
Johns. Rep. 432.
*Smith v. Fen-
ton*, 2 *Cowen*,
425. *Beekman*
v. Wright, 11
Johns. Rep. 442.

the defendant made his application in season. One adjournment had already been made, at his request, after issue was joined. It does not appear that during the period of that adjournment, the defendant took any steps to procure the attendance of the witnesses he afterwards alleged that he wanted. This application must be made in due season. It would clearly be too late, if it was not made *until the jury had been sworn, and the plaintiff had entered upon his proof. There must be some reasonable limitation to the time of the application, and of which the court is to judge. After one adjournment at the request of the defendant, to enable him to prepare for trial, it would be vexatious to allow him another, on the usual affidavit, and without showing any diligence in the mean time. The first adjournment prayed for by the defendant was for time to prepare for trial, and was a substitute for an adjournment on affidavit and security. Both the witnesses whose names were given by the defendant, lived within four miles of the court. The defendant is always entitled, as of right, to one adjournment, to procure testimony, on making the requisite oath; but if he neglects to take out *subpœnas*, or make any effort to procure his witnesses after issue joined, and after an adjournment on his own motion, he ought not, in reason and justice, to be entitled to a farther adjournment, without some special cause shown for the non-attendance of his witnesses, or for the adjournment. On the adjourned day, after issue, the plaintiff is supposed to appear with his proof, and the jury to appear upon the *venire*, and it would be an abuse, for the defendant to be entitled, as of course, to another adjournment to procure his testimony, without having taken any one step, towards it, in the mean time, or shown any one reason why he has omitted to do it. The statute could not have intended to help a party in his wilful negligence. In the case of *Easton v. Coe*, (2 *Johns. Rep.* 383,) it was to be presumed efforts had been made, during the first adjournment, to procure the witness, for it appeared, on the second application, that the witness lived out of the county. It was assumed in that case, that the application was made without any imputable neglect, for none appeared or was pretended; but here the court cannot avoid seeing that the application was founded on gross neglect, and it was, therefore, properly overruled, as too late, without some special cause shown.

Judgment affirmed.

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*M'INSTRY against TANNER.

On the return
to a *certiorari*,
the court will
not admit the
objection that
the justice was

IN error, on *certiorari*, from a justice's court.

Tanner brought an action of *trover* against *M'Instry* for a chest of tools. The cause was tried by a jury. In the autumn of 1807, the chest of tools, which were the property of

one *Andross*, were sold at public auction, under an execution, and purchased by one *Bartholomew*, who, soon afterwards, sold them to *Tanner* for nine dollars, which was less than their value. *Tanner* lent and delivered them to *Andross*, who continued in the possession of them, until they were taken by virtue of an execution in favor of *M'Instry* against *Andross*, in the spring of 1809, and sold.

It appeared that the goods were purchased by *Tanner* at the request of *Andross*, and were delivered to him to use, without any stipulated consideration or any limitation of time. There was an unsettled account between them. *Andross*, who was a witness, testified that the goods were not sold to him by *Tanner*, nor was there any secret or implied trust between them. A witness for the defendant below stated, that *Andross* had said the chest of tools were his property.

The jury found a verdict for the plaintiff, on which the justice gave judgment. The plaintiff in error made two objections; 1. That the justice was a minister of the gospel; 2. That the verdict was against evidence.

The justice, in his return, stated, that he was not a priest, or minister of the gospel.

Per Curiam. There is no ground for the objection that the proceedings before the justice were *coram non judice*, because he was a priest, or minister of the gospel. It was not true in point of fact; for the allegation is expressly contradicted in the return, and if it were not so, it might well be questioned whether the court could take notice of such an objection, in this way, since we are to intend that the justice acted under a regular commission; and he has not been put to answer for an unconstitutional exercise of power. The acts of officers *de facto*, are often valid, as far as they concern the public and the rights of third persons. The only real question in the case is, whether the law arising upon the facts would warrant the verdict. There were circumstances *in this case from which a jury might have inferred a fraudulent collusion between *Tanner* and *Andross*, to cover this property; but the jury have drawn a different conclusion, and the case is not so strong as to warrant an interference with their verdict. There are cases in which goods may be safely left with the original owner, as was intimated in the case of *Putnam v. Wiley*, (8 *Johns. Rep.* 435,) and as was decided in the case of *Kidd v. Rawlinson*. (2 *B. & P.* 59.) That decision seems to confine the case to instances in which the parties do not stand in the relation of debtor and creditor; and where, of course, there could not have been any object to defeat other creditors, and where the goods were lent for a temporary, benevolent and honest purpose. The jury must have considered this case as coming within that principle; and, upon the whole, the judgment must be affirmed.

Judgment affirmed.

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a priest, or minister of the gospel, and that the proceedings were, therefore, *coram non judice*, but will presume that the justice acted under a regular commission.

The acts of officers *de facto*, are valid, as respects the public and the rights of third persons.(a)

Where the parties do not stand in the relation of debtor and creditor, and the object is not to defeat creditors, goods may be left in the hands of the original owner, without its being considered fraudulent.(b)

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(a) Vide *Potter v. Luther*, 3 *Johns. Rep.* 481. *People v. Collins*, 7 *Johns. Rep.* 549. *Reed v. Gillett*, 12 *Johns. Rep.* 296. *Wilcox v. Smith*, 5 *Wendell*, 231.

(b) Vide *Craig v. Ward*, *infra*, 197. *Rew v. Barber*, 3 *Coven*, 272. *Sturtevant v. Ballard*, *infra*, 337, and the cases cited in the opinion of the court. *Farrington v. Caswell*, 15 *Johns. Rep.* 430.

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May, 1812.

WILLOUGHBY
v.
CARLETON.

WILLOUGHBY against CARLETON.

IN error, on *certiorari*, from a justice's court.

Where after issue joined, the cause was adjourned, at the request of the defendant, and at his request, a second adjournment was granted, on account of the absence of material witnesses, it was held, that any objection to such adjournment was waived by the plaintiff's appearing at the day and going to trial on the merits. (a)

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The decision of *fence viewers*, as to the proportion of fence of each party, is not requisite, if there is no dispute between them; nor are the *fence viewers*, in such case, to settle the costs and expenses of repairing the fence.

Parol proof of a written notice to repair is sufficient.

A deed cannot be proved by the grantee, without accounting for the absence of the subscribing witnesses. (b)

Carleton brought an action against *Willoughby*, for work and labor in putting up a fence, being the division fence between their lands, and the proportion belonging to *Willoughby*, which he had neglected to mend, for more than a month after request. Plea, the general issue, and set-off. The justice adjourned the cause, at the request of the defendant, to the 1st *January*, when the parties appeared; and the plaintiff requested an adjournment, on account of the non-attendance of a witness who had been subpoenaed. The defendant objected, but the justice granted the adjournment, on the plaintiff's oath, and giving security. There was a trial by jury. The justice ruled that it was not necessary for *Carleton* to show, that the proportions of the fence to each party had been settled by *fence viewers*, because it did not appear that any dispute had arisen. He also decided, that it was not requisite that the costs and expenses of the fence should be settled by the *fence viewers*, but might be proved by witnesses. The justice *also admitted *parol* proof of a written request given to the defendant for a month, to mend the fence, though no notice had been given to produce the writing. The defendant, *Willoughby*, offered to prove that he had sold the land adjoining the land of the plaintiff, at the time of the notice, and produced the deed, and the grantee, to prove it; but the justice ruled that the subscribing witness was necessary, and the evidence offered was rejected. The jury found a verdict for the plaintiff, for seven dollars, on which the justice gave judgment.

Per Curiam. There is no well founded objection to the judgment below. 1. Whatever objection there might have been to the second adjournment, on the strict construction of the act, the granting it was reasonable and just, under the circumstances of the case, (See *Powers v. Lockwood*, ante, p. 133,) and the objection was waived by the appearance of the defendant, afterwards, on the day of adjournment and going to trial on the merits. This cured the irregularity, according to the case of *Dunham v. Heyden*. (7 *Johns. Rep.* 381.)

2. The justice was correct in ruling that a decision of the fence viewers, as to each party's proportion of the fence, was not requisite, if no dispute existed as to the proportions; nor were the costs and expenses of repairing the fence to be settled, in this case, by the fence viewers.

3. The admission of parol proof of the written notice to

(a) Vide *Hill v. Downer*, 11 *Johns. Rep.* 461. *Kilmors v. Sudam*, 7 *Johns. Rep.* 529. *Morrell v. Mar*, 1 *Cowen*, 119.

(b) Secundum evidence of the execution of a deed is inadmissible unless the absence of the subscribers' witnesses is accounted for. *Jackson v. Cady*, 9 *Cowen*, 140. Nor can the confession of a grantee be received even against himself, until the court are satisfied that the witnesses cannot be obtained nor their signature proved. Vide *Clark v. Sanderson*, 3 *Binn.* 198

the defendant to repair, was also correct. *Tower v. Wilson*, NEW-YORK, May, 1812.
(3 *Caines' Rep.* 174.)

4. The defendant was not entitled to prove his deed by the grantee, without accounting for the absence of the subscribing witnesses. The grantee had the strongest interest in the question to be put; and it showed the danger of departing from the general rule, as to the proof of deeds.

Judgment affirmed.

***WARD against AMES.**

[* 138]

IN error, on *certiorari*, from the justice's court of the city of New York.

Ames brought an action of *assumpsit* in the court below, against *Ward*, as master of the ship *Margaret*, to recover his wages as a seaman on board of the said ship, on a voyage from New-York, to Cadiz, and back to New-York. The defendant pleaded *non assumpsit*, and that the plaintiff had forfeited his wages by desertion. The plaintiff had signed the articles, in the usual form, for the voyage, and performed his duty as a seaman on board the ship, until the 22d February, 1810, when the ship was lying in the harbor of Cadiz. The plaintiff was ordered by the mate to strap a block, and while doing it, was asked by the mate, why he did not tar the rope, and was answered that he had done so; the mate then struck the plaintiff violently and repeatedly. He knocked him down several times, and beat him in a cruel and unjustifiable manner. The plaintiff, after he had been so treated, struck the mate with a marling spike, and cut his head. The defendant was on the quarter-deck during the time, but did not interfere until after the plaintiff struck the mate, when he came up and struck the plaintiff. The mate went on board a *British* ship of war lying in the harbor, and had the wound in his head dressed, and shortly after, a midshipman with a boat's crew came from the *British* ship on board the *Margaret*, and demanded the plaintiff. The midshipman was invited into the cabin by the defendant, who permitted the *British* seamen to search for the plaintiff, who kept concealed and was not found. The visit and search for the plaintiff, by the *British* officer and men, was twice repeated, without any opposition on the part of the defendant; and the plaintiff concealed himself each time, so as to avoid discovery. On the night of the 22d Feb. the plaintiff left the *Margaret*, and got on board of another *American* vessel, and worked his passage home, without wages, and arrived in New-York the May following.

If, during a voyage, a seaman is compelled to leave the ship, on account of ill usage and cruel treatment by the master, or through his agency, and for fear of his personal safety, it is not a case of voluntary desertion, and he is entitled to recover his full wages for the whole voyage.

The court below gave judgment for the plaintiff, for the whole amount of his wages, being eighty dollars.

Per Curiam. The question arising on this case is, whether the plaintiff below was not compelled to leave the ship, and

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actually *forced out of the service by cruel treatment, and the danger of impressment, through the agency of the master. The court below must have drawn that conclusion. The seaman was, in the first place, and without any justifiable cause, cruelly beaten and abused by the mate, in the presence, and by the tacit consent, of the master. He was provoked to strike in his defence, and the mate was wounded in the head. With the knowledge, and, it is to be presumed, by arrangement with the captain, the mate went on board of a *British* man of war, lying in the harbor of *Cadiz*; a boat belonging to that ship, with a midshipman and crew, soon after came on board the *Margaret*, and demanded the plaintiff, *Ames*. They made repeated searches for him, and with the apparent approbation of the captain; and on the same night the plaintiff left the ship. This is a strong case of an escape coerced by ill usage and danger of personal safety. No explanation of the transaction was given by the master, upon the trial of the cause, and the court below were warranted in their deduction, that this conduct was equivalent to an unjust and forcible removal of the seaman from the ship, and that he did not, therefore, forfeit his wages. It is an acknowledged principle in the marine law, that if the master unjustly dismiss a seaman, during a voyage, he is entitled to his full wages for the voyage. (*Abbot*, p. 4. c. 2. s. 1. *Pothier*, *Louage des Matelots*, n. 206. *Laws of the Hanse Towns*, art. 42.) And it has been considered and held, that if a seaman is obliged to fly from a service, by extreme ill usage and danger of his personal safety, arising from the master, who is bound to protect him, it is not the case of a *voluntary* desertion, but comes within the reach of the above principle. (*Rice v. The Polly and Kitty*, 2 *Pet. Adm. Decis.* 420. a note to vol. 1. p. 176.) If the facts did not absolutely require, they were at least sufficient to uphold, this deduction, and the competent tribunal having drawn it, there is no just ground for our interference. The judgment below must be affirmed.

Judgment affirmed.

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*SPRAGUE AND ANOTHER *against* SHED.

A warrant issued by a justice of the peace, was returned *cepi corpus*, and the plaintiff did not appear, but the justice gave judgment for the plaintiff, for the amount of a note given by the defendants, re-

IN error, on *certiorari*, from a justice's court.

Shed brought an action against *James* and *Adolphus Sprague*, on a promissory note, for ten dollars, dated the 28th *September*, 1810. The suit was by *warrant*, which was returned, "*cepi corpus*, and the plaintiff notified." The justice stated that he understood by this return of the constable, that he had the defendants in custody. The plaintiff did not appear, nor any person in his behalf. The note was delivered to the justice by some person whose name was not mentioned. On the note was endorsed a request by the defendants to enter

judgment against them. One of the defendants, *Adolphus*, appeared and objected to having judgment entered, and demanded a trial; but the justice refused, considering him precluded by the endorsement on the note, and gave judgment against both the defendants, being, as he said, satisfied, by comparing the hand-writing in the note, and the endorsement, that they were the same.

Per Curiam. This judgment cannot be supported; although it is probable justice has been done. The proceedings were contrary to the established rules of law applicable to justices' courts. The plaintiff not appearing himself, nor any person for him, was a discontinuance of his cause; and the justice had no authority to enter judgment. Although the case is not precisely within that of *Martin v. Moss*, (6 *Johns. Rep.* 126,) here being process issued against the defendants, still it comes within the principle of that case, because, by the default of the plaintiff, in not appearing, his cause was out of court, and, of course, no suit was pending. But admitting the plaintiff to have been in court, the justice should have required proof of the note or confession, and could not give judgment on a comparison of the hand-writing of the endorsement with the signatures of the note, especially as he had no evidence that the signatures to the note were in the hand-writing of the defendants.

Judgment reversed.

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v.
TOLL.

quest to enter judgment was endorsed, and which was delivered to the justice by a third person. It was held, that the plaintiff not appearing, nor any person in his behalf, it was a discontinuance of the suit, and the judgment, therefore, erroneous. (a)

(a) Vide *People v. Whaley*, 6 *Cowen*, 661. *Wilde v. Dunn*, 11 *Johns. Rep.* 459. *Relyca v. Ramsay*, 2 *Wendell*, 602.

*WAILING against TOLL.

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IN error, on *certiorari*, from a justice's court.

Toll brought an action on the case, against *Wailing*, for medicine and attendance, as a physician. The defendant denied the account, and pleaded the general issue. Upon the trial, no witnesses were produced or sworn. But the return stated, that "the plaintiff asked the defendant whether he had not furnished her medicines and attendance, as a physician, as he had charged her in his account, to which she answered in the affirmative; but, at the same time, said she had not employed him, and that she was under the age of twenty-one years." No further proof was offered by either party. The justice gave judgment for the plaintiff for five dollars and thirty-seven and a half cents, besides costs.

Per Curiam. The judgment must be reversed. The plaintiff relying altogether upon the defendant's confession, that confession must be taken altogether; and although she admitted that the medicine and attendance had been furnished her, yet, at the same time she denied her responsibility for the amount, because she had not employed the plaintiff, and because she was a minor. She might avail herself of her infancy, under the plea of *non assumpsit*. (1 *Salk.* 297. 1 *Esp. N. P.* 301.) For any thing that appears, and, indeed, such is the

Where a person was sued for a physician's bill, before a justice of the peace, and she confessed, that the plaintiff had furnished the medicines, &c. charged in his account; but said, that she had not employed him, and was under the age of 21 years; it was held, that such confession must be all taken together, and would not authorize the justice to give judgment against the defendant. (a)

(a) The whole declaration or confession of a party must be taken together. *Fenner v. Lew-*

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is, 10 Johns.
Rep. 38. Credit
v. Brown, Id.
365. Hopkins
v. Smith, 11
Johns. Rep. 161.
Smith v. Jones,
15 Johns. Rep.
229.

reasonable intendment, she was living with her father, and the medicine and attendance furnished at his request. An infant who lives with, and is maintained by, her father, cannot bind herself for necessaries. (2 Black. Rep. 1325. 1 Esp. N. P. 303.) The confessions of the defendant, when all taken together, showed that she was not responsible, admitting that the medicine and attendance had been furnished, without something more being proved by the plaintiff. (3 Johns. Rep. 427.)

Judgment reversed.

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*HOTCHKISS against LE ROY AND RODGERS.

In an action brought before a justice of the peace, by an attorney, to recover a bill of costs in a suit in the Court of Common Pleas, the only evidence of his employment, was, that of the attorney of the opposite party, who said, that the plaintiff acted as attorney for the defendant, in that suit. This was held, not to be sufficient evidence of the plaintiff's having been employed by the defendant.

Though it may not be requisite to prove the original employment of an attorney, yet some recognition of him by the party, in the progress of the suit, is necessary to be shown, to make him liable for the costs.

(a)

IN error, on *certiorari*, from a justice's court.

Le Roy and *Rodgers*, who were partners, as attorneys, brought an action against *Hotchkiss*, before the justice, to recover the amount of a bill of costs, in a certain suit commenced by them, for the defendant, in the Court of Common Pleas of *Broome* county. The defendant pleaded *non assumpsit*. The plaintiffs proved, by the attorney for the defendant, in the cause in the Court of Common Pleas, that *Le Roy* and *Rodgers* acted as attorneys for the plaintiff; and that he considered them as such, in the progress of the suit; but there was no other proof that the plaintiffs were employed by *Hotchkiss*. The service of a bill of costs, according to the statute, was proved. It was signed, however, by *Rodgers*, in the name of the plaintiffs, after the dissolution of their partnership. A motion for a nonsuit was made, which was overruled, and the cause submitted to the jury, who found a verdict for the plaintiffs, for the amount of their bill of costs.

Per Curiam. There is no evidence whatever that the plaintiffs below were employed by the defendant to prosecute the suit, in which the bill of costs, for which this suit was brought, arose. It is hardly to be presumed, that the suit was commenced and prosecuted without his directions, but some evidence ought to have been offered to the jury, to authorize them to draw such a conclusion. Although it might be difficult, and, perhaps, impossible, in most cases, to prove the original employment, yet some recognition of the attorney in the progress of a suit, may easily be shown, and without some such proof, it would be unjust, and a dangerous precedent, to make a party liable for costs. The verdict of the jury is unsupported by any evidence, and the judgment must be reversed.

Judgment reversed.

(a) In debt on a judgment rendered in a sister state, where the record stated that the defendant appeared by attorney, it was held that he might shew that the attorney was not authorized to appear for him, but that until he did so, the authority must be presumed. *Shawney v. Stillman*, 6 Wendell, 453. It would seem that the verity of the record must equally be presumed where the suit is for costs incident to the original institution of proceedings as where it is upon the judgment in which those proceedings terminated. And if the presumption of authority is warranted by the production of the record of a sister state, *a fortiori*, is it legitimate where the suit originates and is consummated at home. *Vide M'Farland v. Crary*, 8 Cowen, 253.

**CARTER against JARVIS.*

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WELLS

v.

LANE.

IN error, on *certiorari*, from a justice's court.

Jarvis brought an action of trespass against *Carter*, for cutting and carrying away wheat sown by him upon the land of *Carter*, upon shares. The declaration alleged, that the plaintiff, by *Halsey Rodgers*, his assignee, complained, &c. and it concluded to the damage of the said *Halsey*, assignee as aforesaid, of twenty-five dollars.

A. assigned to B. all his interest in wheat growing on the land of C. which had been sown on shares.

At the trial, in *September*, 1809, *Halsey* appeared for *Jarvis*, and was objected to by the defendant. He produced and proved an assignment of the *wheat* from *Jarvis* to him, and was then admitted to appear in behalf of the plaintiff. On the trial, the assignment was read and relied upon, in behalf of the plaintiff; but it was objected, on the part of the defendant, that the assignment of the field of wheat growing, divested the plaintiff of all right to it, and that he, of course, could not maintain the action. This objection was overruled by the justice, and a verdict was found for the plaintiff, on which judgment was rendered for twenty-one dollars and sixty-seven cents damages, and five dollars costs.

It was held, that an action of trespass for cutting and carrying away the wheat, could not be maintained in the name of A. by B. his assignee; but should be in the name of B. only, to whom the property was assigned. (a)

Wendell, for the plaintiff in error.

Skinner, contra.

Per Curiam. This judgment must be reversed. The wheat growing on the ground, had been sold, and transferred by the plaintiff to *Rodgers*. The assignment is not set out at length, in the return; but it was treated as an instrument duly transferring all the interest of the plaintiff to *Rodgers*; and in the declaration the injury is alleged to be done to *Rodgers*, as assignee of the plaintiff. There was no necessity for bringing the suit in the name of *Jarvis*; and he having divested himself of all interest in the subject, could not, for his own benefit, sustain the action.

(a) *Austin v. Sawyer*, 9 Cowen, 49.

Judgment reversed.

**WELLS against LANE.*

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IN error, on *certiorari*, from a justice's court.

Lane brought an action of debt against *Wells*, before the justice, for two penalties of twelve dollars and fifty cents each, under the act concerning slaves, for harboring the slave of the plaintiff, named *Betty*, on the 8th and 9th days of *November*. The plaintiff, who was a free black, proved that he purchased *Betty* and her mother, about twenty-four years ago, and that he married the mother when *Betty* was about a year old. *Betty* and her mother were born slaves. The plaintiff declared to one witness, that he had purchased his wife and child from bondage, and that they were received among their socie-

Parol declarations made more than 20 years ago, by the owner of a slave, that he purchased her to make her free, and that he meant her to be freed, were held to be a manumission of such slave.

Whetner, since the stat-

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ute of 8th April,
1801, (sess. 24.
c. 188,) a slave
can be manu-
mitted without
some instru-
ment in writ-
ing? *Quare.*
(a)

ty (quakers) as free persons; that he had paid a trifling sum for them, because he had purchased them from bondage into freedom. The plaintiff knew that neither slaves, nor slaveholders could be admitted in the society, and while the plaintiff and his family were in the society, they were considered as children and not as slaves. To another witness he expressed a determination to have a free family, and said that his wife had assisted in procuring her and her daughter's freedom, and that he always called *Betty* his child.

The only proof, as to the harboring, was, that the witness was requested by the plaintiff to warn the defendant from detaining *Betty*; and the defendant replied, that he considered her free; and that the defendant admitted that *Betty* was in his house or family, or something to that effect; that when the defendant was warned not to keep *Betty*, he said she might go, but he could not conscientiously turn her away. The jury found a verdict for the plaintiff, for twenty-five dollars, on which the justice gave judgment.

Per Curiam. In determining whether the negro woman. *Betty*, is to be considered the slave of the plaintiff below, we must look at the law, as it stood at the time of the purchase, which appears to have been upwards of twenty years since. Our present statute relative to manumissions, would seem to require a certificate, or some instrument in writing, for that purpose. And such was the construction intimated by the court, in the case of *Keteltas v. Fleet*. (7 *Johns. Rep.* 330.) The words of the statute are, that it shall be lawful for the owner of any slave, to manumit such slave, **by last will or testament, or by any certificate or writing for that purpose.* (1 *Rev. Laws*, 612.) These terms are more limited than those used in the statute of 1788, (2 *Greenleaf's edit. Laws*, 88,) which are, that if any person shall by last will or *otherwise*, manumit or set free his slave, such slave shall be considered as freed from such owner. And the provision, in the third section of the present statute, was intended to confirm manumissions informally made. It declares, that all the manumissions of slaves made by the people called quakers, and others, before the 9th day of *March*, 1798, although not in strict conformity to the statutes then in force, relating to such manumissions, shall be valid from the time they were made. It would not be giving to this provision its due effect and operation, to consider no manumission valid, unless it was in writing. And if *parol* manumissions were binding, the plaintiff's declarations fully show that he never considered *Betty* as his slave, nor did he purchase her as such. He declared that her former master would not give him a bill of sale of her or her mother, for fear he might abuse or sell them. That he gave a trifling sum for them, because he purchased them from bondage into freedom. That they were received among their society, as free persons; and that he had always called *Betty*

(a) See note
(a) to *Keteltas*
v. *Fleet*, 7
Johns. Rep. 324.

his child. After such declarations and such a lapse of time, to authorize the plaintiff to claim her as his slave, would be extremely unjust; and unless she was his slave, there is no ground upon which he could maintain the action; for she certainly was not a servant, in any other respect, within the meaning of the statute. The judgment must, therefore, be reversed.

Judgment reversed.

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VAN SLYCK
v.
TAYLOR.

***VAN SLYCK against TAYLOR.**

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IN error, on *certiorari*, from a justice's court.

Taylor brought an action of debt against *Van Slyck*, a constable, for the *escape* of *Josias Minkler*, jun. in his custody, under an execution at the suit of *Taylor*, issued by a justice. The execution against *Minkler* was not produced, nor any reason given why it was not. *Parol* proof was given, that the defendant below had such an execution, on which he held *Minkler* in his custody. The amount of the execution was not stated. No objection was made to this *parol* proof. The defendant below moved for a nonsuit, but on what ground was not stated, and the justice denied the motion. The defendant below then proved, that whilst he had *Minkler* in his custody, and was conveying him to prison, he met the justice who issued the execution, and who, after some conversation, (which was not stated,) required the defendant to return him the execution, which was done, and the justice discharged the prisoner. There was a trial by jury, and a verdict for the plaintiff, on which the justice gave judgment for nine dollars and the costs.

In an action for an *escape*, brought against a constable, before a justice of the peace, the execution was not produced, but *parol* evidence was given of it. It was held, that this not being objected to at the trial, could not, afterwards, be alleged for error. (a)

A justice has no authority to discharge a prisoner on execution, without a special power, for that purpose, from the plaintiff in the suit.

And if a constable who has the prisoner in his custody discharges him by order of the justice, who has no such authority from the plaintiff, he is liable to an action for an *escape*.

Per Curiam. The objection now raised against the admission of *parol* proof of the execution, comes too late; it would have been valid, had it been made on the trial, but no such objection appears to have been made, and we cannot intend, for the purpose of reversing a judgment, that this framed the ground of the motion for a nonsuit. All intendments ought to be in support of the judgment. The constable doubtless acted in good faith, and in obedience to what he supposed competent authority, in discharging *Minkler*, yet this will not excuse him. The justice had no authority, in his official character, to order the prisoner discharged, and no special power for that purpose appears to have been given by the plaintiff in the execution. It was, therefore, an act altogether unauthorized, and will not excuse the constable.

(a) Vide *Bush v. Taggart*, 7 Johns. Rep. 19.

Judgment reversed.

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The trustees of an incorporated religious society, are,

(a) 3 R. S. 507—511.

virtute officii, entitled to the possession of all the temporalities, and are considered as lawfully seized of the ground and buildings belonging to the church; and if the trustees close the door of the church against the minister and congregation, and they break and enter the church, by force, an indictment, at the instance of the trustees, will lie against them, for such forcible entry.

In an indictment for a forcible entry and detainer, it is enough if the complainants, or party injured, and the injury, are stated with sufficient certainty to enable the court

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to ascertain the injury, and award restitution; and any variance, not essential, in the description or name of a corporation, will not vitiate the proceedings.

Where the trustees of a religious incorporation were required by statute, to be divided into three classes, and the

*THE PEOPLE against W. RUNKLE.

AN indictment for a *forcible entry and detainer* was found the 19th June, 1810, against the defendant and *John Runkle* and *John Bicker*, since deceased, under the third section of the "Act to prevent forcible entries and detainers." (Sess. 11. c. 6, 7.(a) See 8 Johns. Rep. 464—466.)

The indictment was tried at the *New-York* sittings, in *December*, 1811, before Mr. Justice *Van Ness*. The following facts, in addition to what appear in the report of the case, on a former motion for a new trial, are all which it is thought material to state.

George Gilfert, a witness for the prosecution, testified, that the trustees of the *German Reformed Church*, for many years previous to the 13th June, 1810, had the possession of the church; that the trustees, according to the church government, were ordered by the consistory to take charge of the property, and lock the church against *Runkle*; and the witness and two other trustees were appointed a committee for that purpose, and that, in compliance with the order of the consistory, the committee locked the church and fastened the windows, and the witness took the keys, which were, at the time of the forcible entry, and then were, in his possession; that on the 11th of June, 1810, the trustees received the following written demand of the records, papers and property of the church. "New-York, June 11th, 4 o'clock, P. M. 1810. We the subscribers, corporation of *The Reformed Protestant High Dutch Church*, in *Nassau Street*, between *John Street* and *Maiden Lane*, in this city, request and demand of you, Messrs. *George Gilfert*, *Mathew Luff*, *Ludowick Sherman* and *Engle Frennd*, late trustees of the *German Reformed Church* aforesaid, and of all other persons whatsoever, all the keys, seals, books, documents, bonds, papers, money, accounts, treasury, and every thing and article and property, &c. belonging and appertaining *to said church or congregation. In virtue whereof, we have hereunto affixed our names and seals." Signed by *William Runkle* and eight others; and the said defendant has continued to preach there ever since.

A certificate of incorporation was then produced, in the words following, to wit: "City of *New-York*, ss. We the subscribers, elders of the *German Reformed Church*, in the city of *New-York*, do hereby certify, that the members of the said church, having been duly convened on the thirty-first day of *May*, last past, agreeably to, and for the purposes mentioned in an act of the legislature of this state, passed on the sixth day of *April* last, entitled 'An act to enable all the religious denominations in this state to appoint trustees, who shall be a body corporate, for the purpose of taking care of

the temporalities of their respective congregations, and for other purposes therein mentioned; did, in pursuance of the said act, proceed to the election of the said trustees, and that, upon the votes of the said members of the said congregation then and there assembled being taken, the following persons were, by a plurality of voices, elected to that office, namely, *Henry Whiteman, Christopher Freguehein, Frederick Weissenfels, William Lionhard, William Snyder, Frederick Boddige, Christian Will, George Dietrick, and Anthony Apple*, and we do hereby certify, that it was then and there unanimously agreed, that the style and name by which the said trustees and their successors should be thereafter known, should be by the style and name of '*The Corporation of the German Reformed Church, in the city of New-York.*' In witness whereof, we the said elders have hereunto set our hands and seals, this ninth day of *June*, in the year of our Lord one thousand seven hundred and eighty-four, and of the independence of the state the eighth." Signed, *Henry Will and Jacob Spray*.

"*Be it remembered*, that on the eleventh day of *June*, one thousand seven hundred and eighty-four, before *John Sloss Hobart*, one of the justices of the Supreme Court of Judicature for the state of *New-York*, came and appeared *John Mildollar*, one of the subscribing witnesses to the foregoing certificate, who being duly sworn, deposed that the aforementioned *Henry Will* and *Jacob Spray* signed and sealed the same in presence of *Andrew Rode* and the deponent, and that the said *Andrew Rode* signed his name as a witness thereto, in presence of this deponent; and *I, having inspected the same, and finding no alterations therein, do order it to be recorded.

"*John Sloss Hobart.*"

"Recorded in the office of the city and county of *New-York*, this 11th day of *June*, 1784.

(Signed)

"*Robert Benson, Clerk.*"

It was objected, on the part of the defendant, that the evidence varied from the record, in the style of the corporation, but the objection was overruled by the judge. Mr. *Gilfert* testified, that *George Gilfert, Mathew Luff, Ludowick Sherman* and *Engle Frennd*, were the trustees of the *German Reformed Church* in the city of *New-York*, at the time the consistory of that church gave orders to lock the church against *Runkle*, and at the time of the entry by the defendant.

The defendant then gave in evidence his *call*, by the congregation of the said church, which was attested by the chairman of the board, at the meeting of the corporation, on the 25th day of *August*, 1805.

To show that the corporation of the *German Reformed Church* was dissolved, the defendant proved, that the election for trustees had always been held on *Pinxter Monday*.

The defendant further proved, that part of the congregation

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seats of one class were to be vacated at the expiration of every year, so that one third should be "annually chosen," and that the time of the annual election should be, at least, six days before the vacancies should happen; it was held that an election on *Pinxter Monday*, (Monday after *Whitsunday*), in each year, though a moveable holy day, and not a day certain, was valid.

Where the officers of a corporation are required to be annually elected, it seems, that they may con-

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tinue in office after the year, and until others are elected. (a)

(a) The trustees *de facto* of a religious society, though they were irregularly elected, are in *colore officii*; and their proceedings are valid until they are ousted by judgment at the suit of the people. *Vernon Society v. Hills*, 6 Cowen, 23. Vide *Ex parte Wilcocks*, 7 Cowen, 402.

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attached to Mr. *Runkle* assembled on the 23d of *May*, 1810, incorporated themselves, under the act of the 27th of *March*, 1801, styling themselves *The Minister, Elders and Deacons of the Reformed Protestant High Dutch Church*, the certificate whereof was in the words following, to wit:

“By virtue of the act of the legislature of the state of *New-York*, entitled ‘An act to provide for the incorporation of religious societies,’ passed the twenty-seventh day of *March*, one thousand eight hundred and one, we the minister, elders and deacons of the *Reformed Protestant High Dutch Church*, in the city of *New-York*, in *Nassau Street*, between *John Street*, and *Maiden Lane*, and our successors for ever, shall, as a body corporate, be called, distinguished and known, by the name, style or title of ‘*The Minister, Elders and Deacons of the Reformed Protestant High Dutch Church in the city of New-York.*’ Given under our hands and seals, the twenty-third day of *May*, in the year of our Lord one thousand eight hundred and ten.” Signed by *William Runkle* and eight other persons.

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Peter Dob was then produced and sworn, who proved that the church was opened by the order of the new corporation, and a *large majority of the congregation. He further proved, that in *March*, 1810, a partial meeting of the congregation was called by the old trustees, at which a motion was made for the dismissal of Mr. *Runkle* from the ministry of the church, and two papers prepared, one to be signed by those in favor of his being discharged, and the other by those against it. That thirty-three persons, some of whom were not stated hearers of the church, signed the paper for the discharge of Mr. *Runkle*, but such of Mr. *Runkle's* friends as were present, thinking the proceedings irregular and highly improper, refused to vote upon the question. He further said, that there was a majority of the congregation in favor of Mr. *Runkle*. On his cross-examination, he stated that at a meeting of the new congregation, it was proposed by some one, that *Aymar*, the blacksmith, should be sent for to open the church, but he did not recollect that the proposition was made by Mr. *Runkle*; that it was determined that the church should be opened, and it was known, at that time, that the church was locked against Mr. *Runkle*. It appeared that Mr. *Runkle* was present at this meeting.

On the part of the prosecution, the Rev. *Gerardus Kuyper*, a minister of the *Low Dutch Church*, proved that the *German Reformed Dutch Church* was considered as forming a member of the *Classis of New-York*, in the ecclesiastical government of the *Reformed Protestant Dutch Church, in North America*, and it was considered subject to the jurisdiction of the *Classis of New-York*; that by the constitution of the *Reformed Dutch Church*, no call of a minister is valid, unless approved of by the *Classis*, nor can a minister be

legally confirmed, without the order of the *Classis*; that no church or consistory can withdraw itself from the *Classis*, without permission from that body. He further proved that Mr. *Runkle's* call had never been approved by the *Classis* of the *Low Dutch Church*. The minutes of the proceedings of the *Classis* were produced, by which it appeared, that from the year 1772 to 1775, that church had been regularly represented, annually, in the said *Classis*; that from 1776 to 1783, during the revolutionary war, no minutes were kept; that in 1784, the church was not represented; that in 1785, the congregation withdrew itself from the dominion of the *Classis*, but the *Classis* never assented thereto; that in 1797, there was a proposal made by the *Classis* for a re-union with the said church, to which no answer was received, until the year 1800, when the proposition was agreed to; and an *entry was produced, in the minutes of the consistory of the *German Reformed Church*, whereby it appeared that the consistory of that church unanimously assented to the re-union; and representatives were sent to attend a meeting of the *Classis*; that the said church was regularly represented in the *Classis*, from the period of its re-union, until the year 1805; that in the year 1801, a minister was called by the congregation, whom the *Classis* disapproved, and refused to confirm, but he nevertheless preached for some time, until his decease. Mr. *Kuyper* further proved, that in 1805 there was no dismissal of the said church from the government of the *Classis*, neither was there any in 1785. He further testified that Mr. *Runkle* had never appeared in the *Classis* of the *Reformed Dutch Church* in *New-York*.

John Frederick testified that he was a member of the consistory of the *German Reformed Church*, in 1805; that they had been for some time without a minister, from the difficulty of procuring one who could preach both in *English* and *German*; that at length the congregation assembled and called Mr. *Runkle*; that the consistory were opposed to the call of Mr. *Runkle*; that Mr. *Runkle*, immediately on his arrival, refused to acknowledge the authority of the *Classis* of *New-York*, or to sign the articles of faith of that church, which produced some dissatisfaction among the congregation, and those who were dissatisfied left the church; that Mr. *Runkle* recognised the consistory as the spiritual governors of the church; that the old consistory served a year after Mr. *Runkle* came, and the witness, at the expiration of the year, was re-appointed a member of it; that at the first meeting of the consistory, after Mr. *Runkle's* coming to *New-York*, upon his call, it was proposed to him, by the consistory, to join the *Classis* of *New-York*, and to have his call approved by the *Classis*, which he wholly refused, alleging that the *German Reformed Church* was subject to the *Synod of Pennsylvania*; that he would not recognise the authority of the *Classis* of

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New-York, and did not assent to their doctrines; that only fifty-five voted for calling Mr. *Runkle*.

Adam Bergh proved, that by the constitution of the *German Reformed Church* there were two bodies, viz. the *trustees*, who form the body corporate, and have the charge and custody of the temporalities of the church, and the *consistory*, consisting of the *elders* and *deacons*, who manage the spiritual concerns of the church; that the members of the *consistory* are appointed by their predecessors in office, and it had often happened, that persons who were *trustees*, were also appointed to be of the *consistory*; that it is the duty of the minister to publish the names of the *consistory*, for the ensuing year, for three successive *Sundays*, preceding their installation, and if no valid objection is made, to instal them; that in the year 1810, certain persons had been nominated to be members of the *consistory* for the ensuing year, and that Mr. *Runkle* published them for one *Sunday*, but refused to do so on the second and third, or to instal them; that some of the members appointed were also trustees; that a meeting of the *consistory* was called, in *January*, 1810, and objections there made to the conduct of Mr. *Runkle*, in refusing to publish and instal the new members; that Mr. *Runkle* alleged that the congregation attached to him opposed their installation, on the ground that they were also trustees. The *consistory* resolved that the reason for refusing to publish and instal the proposed members, was insufficient, and that the *consistory* were the proper tribunal to judge of the sufficiency of objections made to proposed members, and that unless he did publish and instal the proposed members, they would no longer consider him as their minister; that Mr. *Runkle* thereupon declared that he would not instal the proposed members, and withdrew from the meeting, on which they elected a chairman, and passed a resolution, that Mr. *Runkle*, having refused to publish and instal the proposed members for the *consistory*, and having otherwise misconducted himself, could no longer be considered the minister of the *German Reformed Church*, and that notice should be given to the trustees to take measures for the security of the property, and to lock the church against him; which resolution was communicated verbally to the trustees, by the members of the *consistory*.

Mr. *Kuyper*, who was again examined, said, that he did not think there could be a legal *consistory*, without a presiding minister, but there might, perhaps, be a *consistory*, without the minister, in an independent church, but of this he had doubts; that if a minister opened a meeting of the *consistory*, and his conduct becoming the subject of discussion, withdrew himself, the members so convened could not legally pass upon it. He further added, that the *consistory* had no power to dismiss a minister; but it might be different when there was but one minister to a congregation.

*It was admitted, that none but the friends of Mr. *Runkle*, had notice to attend the meeting of the 23d *May*, 1810, when the new corporation was formed.

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The Rev. Mr. *Mildollar* testified, that he was the minister of the church for several years preceding Mr. *Runkle*; that the call of the witness was approved by the *Classis*, and he always considered himself subject to their jurisdiction, and he represented the *German Reformed Church* in *New-York*, in that body; that that church was not subject to the *Synod* of *Pennsylvania*; that he was called from that church to *Pennsylvania*, and his removal was with the approbation of the *Classis* of *New-York*.

The questions of law arising on the evidence were reserved, by consent, and the question of force submitted to the jury, who found a verdict against the defendant.

Bristed, for the defendant, contended 1. That there was a material and fatal *variance*, as to the style and title of the corporation, between the indictment and the evidence given at the trial. The indictment states, that "the trustees of the *German Reformed Church* in the city of *New-York*," were seised, &c., and the certificate of incorporation declares, that the trustees and their successors should be known by the style and name of the "corporation of the *German Reformed Church* in the city of *New-York*."

The act for the incorporation of religious societies, (*sess.* 24. c. 79. s. 4,) (a) empowers them to sue and be sued by their corporate name and title. A corporation can do no legal act, but in its true name and title. (*Kyd on Corporations*, 227—303. 10 Co. 122. b. 124. b. 125. a. *Moore*, 285—287. *Bro. Ab. Corp.* 1. 65. 2 *Bulst.* 185. 2 *Salk.* 451. 3 *Salk.* 103. *Ld. Raym.* 1515. 2 *Stra.* 187. *Cowp.* 26. 29.) And if judgment be given against them, by a wrong name, it is error. (*Lord Raym.* 119.) A corporation must prove itself such, and its true name, at the trial, by producing its charter of incorporation. (*Hob.* 211. *Lord Raym.* 1535.)

(a) 3 R. S.
295. sec. 4. 1
R.S. 599—600.
sec. 1. 2.

2. The law deems the possession to be in the legal trustees. (*S. C.* 8 *Johns. Rep.* 464. 469.) The important question then is, who were the legal trustees? The church was first incorporated, under the act of the 6th *April*, 1784. (*Greenleaf's* edit. of *Laws*, p. 71. *Sess.* 7. c. 18.) The trustees are to continue in office for three years from the day of their election. (*S.* 7.) These trustees are to be divided into three classes, and the first class are to go out at the end of the first year, so that one third of the trustees must be chosen annually. The election must take place on a day certain. Now the elections took place on *Pinxter Monday*, which being the *Monday* next after *Whitsunday*, *a moveable festival, is not a certain day. A non-election of trustees on the day fixed by the charter, works a dissolution of the corporation, at common law; and there is no provision in the act relative to the incor-

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(a) But see
3 R. S. 299.
sec. 15. 3 R. S.
304. Act of
Feb. 15, 1826.

poration of religious societies, (*sess.* 24. c. 79,) (a) that provides against a dissolution for that cause.

In all the special charters of incorporation, granted by the legislature, there is a provision that a non-election, at the day shall not work a forfeiture. This shows, that where no such provision is made, a non-election, at the day, must produce a forfeiture; for no election can be held but on the charter day. The statute of 11 *Geo.* I. c. 4, was passed to remedy that inconvenience, in regard to corporations in *England*. (*Kyd on Corporations*, 452—517. 3 *Term Rep.* 220. 8 *Mod.* 129. 3 *Burr.* 1866. 10 *Mod.* 346. *King v. Amery*, 2 *Term Rep.* 515. 4 *Term Rep.* 122.) There is no such statute in this state.

If, then, there was a dissolution of the corporation, the persons at whose instance this prosecution is carried on, have no right. And the case shows that the defendant and his associates were duly and legally incorporated under the act of 21th *March*, 1801. (*Sess.* 24. c. 79. s. 11.) The defendant and his associates, therefore, were the legal trustees.

Again, the defendant was, and is, the lawful minister of this church. He was duly *called*, by a majority of the congregation, in 1805. He could not be dismissed, without the sentence of a competent *ecclesiastical* tribunal. In the *Low Dutch Church*, the only competent tribunal is the *Classis*. In the *High Dutch Church*, it is the *Synod*. The *consistory* are neither a *Synod* nor a *Classis*. Admitting, therefore, that the old corporation was not dissolved, their proceedings were irregular and illegal, and ought not to have any effect in a court of justice. Every minister is bound to act, preach and teach according to his contract. If he does not, that is to be decided by the proper tribunal of the church of which he is a minister. Here the defendant was violently ejected from his church, by the trustees, in union with the consistory. *Lay* patronage in *England* is mischievous and bad enough; but this multitudinous *lay* patronage, if tolerated, must produce infinitely greater mischiefs. *Lay* trustees are not amenable to the superior ecclesiastical tribunals, and being possessed of the temporalities, they may eject a minister, at their pleasure, for the very reason, perhaps, that he preaches the purest and soundest doctrines of christianity, and with a view to introduce deism, atheism and every other abomination in their place.

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* *Colden*, contra, insisted, 1. That the alleged *variance* was immaterial. But there is, in fact, no variance; for the true name of the corporation is, "the *Reformed Dutch Church* in *New-York*," and the words "*trustees of*" in the one, and "*corporation of*" in the other, do not form part of the corporate name. The words in the indictment are not intended as an exact description of the corporation, but are merely to show who had the custody of the temporalities.

Again, though where a corporation is a party to a suit, it

must be exactly described by its corporate name, yet that precision is not required, where the corporation is only referred to in a suit in which it is not a party. It is sufficient if there be words of description enough to identify the corporation. (1 *Kyd on Corp.* 227. 2 *Bac. Abr. Corp. C.* 2. 5.)

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2. In the written demand made by the defendant and his associates, on the 11th *June*, 1810, they recognize *Gilfert and the others*, as trustees, and they call on them to deliver up the books, records and keys.

The objection as to the old corporation being dissolved, because the election was on *Pinxter Monday*, and not on a day certain, in each year, can have no effect; for the old trustees might hold over until new ones were elected. Besides, according to the statute, only one third of the trustees were to be elected annually.

(Here he was stopped by the court.)

D. B. Ogden, in reply, observed, that though this action was, in its form, a criminal suit, in the name of the people, yet, in truth, it was a civil suit for the benefit of the trustees, who are the real plaintiffs. It was, therefore, equally necessary that the corporation should be described by its true and legal name.

Again, whatever may be the legal name of the corporation, the prosecutors are bound to show that they are the trustees; but there is no evidence of that fact. The minutes of the corporation ought to have been produced. The letter of the defendant and his associates calls them the *late* trustees, and does not admit the fact that they are the actual trustees.

If the prosecution is considered as well founded, the court must award restitution. But to whom is restitution to be made? It does not appear that the corporation is now existing.

Again, are not the minister and congregation entitled to the possession of the church, for the purpose of public worship? *Is it fit, or consistent with the public good, that the trustees should turn the minister and congregation out of the church?

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Per Curiam. The two objections to the verdict which may seem to deserve examination, are, 1. The alleged variance between the indictment and the evidence, as to the name of the corporation; and, 2. That by an irregularity in the election of trustees, the corporation of 1784 was dissolved, and the complainants, who assumed to be trustees under that incorporation, were not the lawful trustees.

If these two points are decided against the defendant, the motion on his part must be denied; for according to the provisions of the statute for *the incorporation of religious societies*, and according to the opinion of the court, when this cause was formerly before it, (8 *Johns. Rep.* 464,) the trustees have the possession and custody of the temporalities belonging to the church, whether the same consist of real or

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personal estate. They must, therefore be considered as being, *virtute officii*, entitled to the possession, and as lawfully seised of the ground, and of the buildings belonging to the church; and the merit or demerit of their conduct, in closing the doors of the church against the defendant, cannot be taken into consideration in this case. If they have abused their trust, the congregation who are their constituents, have ample remedy; but this remedy does not consist in a forcible entry upon their possessions. Though the trustees hold the church property in trust for the church and congregation, still it is *their* possession; and the courts are bound to protect them against every irregular and unlawful intrusion made against their will, whether by members of the congregation or by strangers.

1. The proceedings under the statute to prevent forcible entry and detainer, are of a peculiar and anomalous kind. They are loose, and of a mixed nature, being in substance a civil, and in form, a criminal prosecution. The formal parties to the record are the people and the trespasser; and the injured party and his interest need only be stated in the indictment with sufficient certainty, to enable the court to ascertain the injury, and to award restitution. If the complainant be designated sufficiently for this purpose, it is enough; any further technical precision which the forms of pleading might otherwise require, seems not to be requisite. In this case, the trustees of the church have a corporate name by which *they are to sue or be sued, and this corporate name is "*The Corporation of the German Reformed Church in the city of New-York.*" In the indictment they are not described exactly by that name, but as "*The Trustees of the German Reformed Church in the city of New-York.*" It has been suggested that the corporate name begins with the words, *The German Reformed, &c.*, and if so, there was no variation. But admitting that the name begins with the words *The Corporation*, the variation does not appear to be essential, for the corporation, *qua* corporation, is not the plaintiff upon the record. The trustees are known and designated in the statute, by the name of *trustees*. They are so called throughout the statute; and by the fourth section of the act of 6th April, 1784, they are declared to be trustees for the church for which they shall be chosen, and are authorized to take into their custody and possession, all the temporalities belonging to the church for which they should be elected trustees, whether the same consists of lands, &c. In this case, the trustees not being parties to the record, we are not obliged to require them to be described with rigorous precision. We may adopt the more reasonable rule laid down by *Kyd*, (*on Corporations*, vol. 1. 286. 288,) that *the variance must be materially different, in substance, to injure*. This doctrine is to be met with in the books. Thus it is said, (*Com. Dig. tit. Pleader, 2. B. 2.*) that if a personal action be brought against a corporation,

and they plead misnomer, the plaintiff may reply that they were known *as well by the one name as by the other*. And Lord Coke, says, (10 Co. 125. b,) "that in pleading, or in a special verdict, in many cases, if by express averment, or by the finding of the jury, it shall be made apparent to the court, that the true name of the incorporation, and the name in the lease, grant, &c., are all one, in effect, it will much enforce the matter; although, in words, there is some seeming of difference." The trustees of the church are better known by the name of trustees, than by any other corporate name. It is the name given them in all the statutes which relate to religious incorporations. The church is here truly designated, and the difference between *the corporation* of that church, and *the trustees* of that church, is not an essential variation, in a case like this, where they are not the formal parties to the record.

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2. It was proved that the election of trustees "had always been held on *Pinxter Monday*." This was not an exact annual election, as *Whitsunday* is a moveable holyday, and varies with the *time of *Easter Sunday*, but that fact does not prove the corporation to have been thereby dissolved. In the first place, there was always a majority of the trustees in office, as only one-third part were to be annually chosen. The act of 1784 did not prescribe the precise time when the trustees were to be chosen. The trustees first to be chosen were to continue in office "for the space of three years, to be computed from the day of their election," and were to be divided into three classes, and the seats of one class were to be "vacated at the expiration of every year;" so that one-third might be "annually chosen." The time of the annual election was to be appointed by the minister, and was to be "at least six days before the vacancies should happen."

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The church having fixed upon a yearly religious epoch for the election of trustees, it would be very revolting to hold the corporation absolutely dissolved, from the very first time that the elections were so held, and that all its subsequent elections and acts were void, merely because the holyday selected for the election did not correspond with the solar year. We cannot, with propriety, have any annual election that will so correspond, because the calendar day will frequently be the day of the *Christian* sabbath, and a given day of the week, in any month, would not agree precisely with the solar year. We must give the statute a reasonable and liberal construction, for the benefit of the churches. Neither a precise day of election, or of entering upon office, is given. There are many decisions in the books showing that the election in such cases will be valid, if made after the year, and especially, if an integral part of the corporation remains. Thus, in the case of *Hicks v. The Town of Launceston*, (H. B. 8. C. 1. 1 Roll. Abr. 512. 514,) it was held, that though by a charter of in-

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corporation, the vacancy occasioned by the death or removal of an alderman, was to be supplied by an election within eight days thereafter, yet an election at any time, afterwards, was good; for the power of election was incident to the corporation, and the affirmative power to elect within eight days did not take away the implied power. So, in the case of *Foot v. Prowse, Mayor of Truro*, (*Str.* 625,) it was decided, in the Exchequer Chamber, and afterwards affirmed in the House of Lords, that though the aldermen of *Truro* were to be *annuatim eligend*, these words were only directory, and the aldermen were good officers after the year, and until others were elected.

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Again, in the case of *The Queen v. Corporation of Durham*, *(10 *Mod.* 146,) the Court of K. B. said, that though a town clerk be *annuatim eligibilis*, he remains town clerk, after the year, and until another was chosen; but if he had been *eligibilis pro uno anno tantum*, his office would have expired at the end of the year.

It is unnecessary to contend, in this case, that the trustees held over, after the expiration of the year. Perhaps the language of the statute is too peremptory, that the seats of one-third are to be "vacated at the expiration of every year." But the corporation is not thereby dissolved, for two-thirds of the trustees continue in office, and the election of the successors to those whose seats expire, cannot be deemed void, though it might sometimes happen, in consequence of the moveable *Whitsunday*, that the election was not "at least six days" before the vacancy. The trustees so elected would, at least, be trustees, by color of office, and their acts would be good. The corporation still remains, and the irregularity, (if any,) as to the time of the election, would cure itself in the subsequent year. Whether any part of the trustees in office at the time of the trespass, and of the indictment found, came in by an election held within the six days, or after the year, &c. does not appear. In no point of view, therefore, is there any ground to consider the proceedings as irregular, on the pretence of the dissolution of the corporation, or from the want of competent trustees.

Motion denied.

N. B. It was suggested that the defendant ought to be *fined*, and restitution awarded. *The Court* said, they awarded restitution, and assessed the damages at *six cents*, so as to carry the costs; but the statute did not require this court to set a fine.

BLISS *against* RICE.NEW-YORK,
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v.
FERRIS.IN error, on *certiorari*, from a justice's court.

The error assigned in this cause was, that *Bliss*, the defendant below, was an infant, under the age of twenty-one years, and appeared in person, and not by guardian. The defendant in error pleaded *in nullo est erratum*.

**Johnson*, for the plaintiff in error, contended that an infant must always appear by guardian, and if he does not, it is error. (8 *Johns. Rep.* 418. 2 *Johns. Rep.* 291. 6 *Saund.* 117.) That where to an assignment of error in fact, the defendant pleads *in nullo est erratum*, the plea admits the fact, if it is well assigned. The defendant in error ought to have put in issue the fact of infancy. (9 *Vin. Error*, K. a. pl. 1, 2, 3. *T. Raym.* 231. *Saund.* 101, s. 1 *Burr.* 412.)

N. Williams, contra.

Per Curiam. The rule is settled, that if an error in fact is well assigned, and the defendant in error pleads *in nullo est erratum*, he confesses the fact. It was so laid down by *Hale*, Ch. J. in *Okeover v. Owerbury*, (*T. Raym.* 231,) who put the very case of *infancy* assigned for error. (9 *Viner*, 550.) The judgment must be reversed.

Judgment of reversal.

THE PEOPLE *against* FERRIS.

AN attachment was issued against the defendant, for not returning a writ.

Harris objected that the rule for the attachment was entitled in the original suit, and not in the name of the people.

Gardinier, contra.

Per Curiam. All the proceedings until the writ of attachment, including the rule for the attachment, are to be entitled in the original cause. The proceedings after the attachment is granted are in the name of the people.

If an error in fact be well assigned, as the infancy of the

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party, and the def't pleads *in nullo est erratum*, &c. he admits the fact. (a)

(a) Acc. *Harvey v. Rickett*, 15 *Johns. Rep.* 87.

In proceedings against the sheriff, in order to obtain an attachment, the proceedings until the writ of attachment is granted, must be entitled in the original suit.

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STRONG
v.
WHITE.

In an action
of dower, if the
tenant be an in-

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fant, he must
appear and de-
fend by guar-
dian.(a)

HILLYER AND WIFE *against* LARZELERE.

THIS was an action of *dower*. A judgment by default having been obtained against the *tenant*, who was an *infant* under the age of ten years.

Metcalf, for the tenant, moved that the default and subsequent *proceedings be set aside for irregularity, that a guardian *ad litem* be appointed for the tenant, and that he have leave to plead *tout temps prist*, &c.

P. W. Radcliff, contra, objected that in a real action it was not necessary to appoint a guardian, and that the proceedings were regular.

Per Curiam. Let the default and subsequent proceedings be set aside, and a guardian *ad litem* be appointed, who may plead *tout temps prist*, &c.

Motion granted.

(a) An infant can only appear by guardian, the power of appointing whom *ad litem* is incident to the court. *Mockey v. Grey*, 2 Johns. Rep. 192. *Alderman v. Tirrell*, 8 Johns. Rep. 418. If an infant defendant appear by attorney it is error in fact. *Arnold v. Sandford*, 14 Johns. Rep. 417.

STRONG *against* WHITE.

The act rela-
tive to insol-
vent debtors,
and their cred-
itors, passed
the 3d April,
1811, (sess. 34.
c. 132,) does
not extend to
actions for li-
bels or torts.(a)

THE defendant was charged in execution, at the suit of the plaintiff, for six hundred and thirty-five dollars and ninety-seven cents, damages and costs, recovered in an action for a *libel*. He afterwards obtained a discharge under the insolvent act, and he was now brought up on a *habeas corpus*, in order to be discharged from his imprisonment in this suit also.

Hammond and Colden, for the defendant.

J. Strong, contra.

Per Curiam. The act (sess. 34, c. 123, 3d April, 1811,) (b) does not extend to imprisonment for *torts*. It declares that "any insolvent debtor, who is or shall be imprisoned on any civil process, out of any court, &c. or who is or shall be prosecuted in any such court, for *debt*, or on *contract*, *express* or *implied*, might present his petition for a discharge," &c. An action for a libel is not for a debt, or on a contract, express or implied, within the meaning of the act. The motion must be denied, and the prisoner remanded.

Motion denied.

(a) Acc. *Kennedy v. Strong*, 10 Johns. Rep. 289. S. C. 14 Johns. Rep. 199. Vide as to the acts of 1813 and 1819, *People v. Marine Court*, 3 Cowen, 360. *Ex parte Thayer*, 4 Cowen, 66. An insolvent discharge after verdict and before judgment in an action of trespass, does not protect a defendant from imprisonment. *Hodges v. Chase*, 2 Wendell, 248.

(b) 2 R. S. 28. 30. sec. 1. 10.

END OF MAY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN AUGUST TERM, 1812, IN THE THIRTY-SEVENTH YEAR OF OUR
INDEPENDENCE.

JACKSON, *ex dem.* BONNELL AND OTHERS, against
SHARP.

THIS was an action of ejectment, brought to recover part of lot No. seventy-two, in the township of *Aurelius*, in the county of *Cayuga*. The cause was tried at the *Cayuga* circuit, before Mr. Justice *Yates*, the 11th of *June*, 1811.

The plaintiff gave in evidence, a patent from *John Bonnell*, one of the lessors of the plaintiff, for lot No. seventy-two, in *Aurelius*, dated the 8th *July*, 1790, and a deed from *Bonnell* to *Andrew Goodyear*, the other lessor, dated 11th *September*, 1807, which was recorded the 25th *April*, 1811. The possession by the defendant of the premises in question was also proved.

The defendant gave in evidence a power of attorney, dated 7th *April*, 1805, duly acknowledged, and recorded the 17th *October*, *1806, from *Stephen Thorn*, authorizing *Joseph Grover* to sell the whole of lot No. seventy-two, in *Aurelius*, &c.; and articles of agreement between *Joseph Grover*, as attorney of *Thorn*, and *Samuel* and *Abraham Foster*, by which *Thorn*, by his said attorney, covenanted to convey one hundred acres of lot No. seventy-two, and which included the premises in question, at a future day, to *S. and A. Foster*, for the sum of five hundred dollars, to be paid at a future day. This agreement, with the premises, was, afterwards, by a written endorsement, under the hands and seals of *S. and A. Foster*, dated the 26th of *April*, 1805, assigned to *Sharp*, the defendant. A deed was also read in evidence, dated the 26th of *November*, 1807, from *Thorn* to the defendant, for eighty acres, part of lot No. seventy-two, being the premises in question, for the consideration of four hundred dollars.

A. entered into possession of land, without title, and afterwards entered into a contract with *T.* who covenanted to give him a deed for the land. *A.* assigned the contract to *S.*, who took possession, and afterwards received a deed from *T.* in *November*, 1807, and afterwards, a deed from *B.*, the patentee and true owner, in *September*, 1808,

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which was duly recorded in *October*, 1808. A previous deed had been given by *B.*, the patentee, in *Sept.* 1807, to *G.* but which was not registered until *April*, 1811.

It was held that the original possession of *A.* being without title, was to be deemed the possession of *B.* the patentee, and that the possession of *S.* under the covenant from *A.* to *T.*

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was not adverse.(a)

The doctrine of adverse possession is to be taken strictly, and must be made out by clear and positive proof, and not by inference. Every presumption is in favor of a possession, in subordination to the title of the true owner.

If a subsequent purchaser has notice, at the time of his purchase, of a prior unregistered deed, it is the same to him as if such deed had been registered; and if the agent of such subsequent purchaser, at the time of making the purchase, knows of the prior unregistered deed, it is the same as notice to his principal.(b)

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(a) Acc. Jackson v. Waters, 12 Johns. Rep. 365. Jackson v. Thomas, 16 Johns. Rep. 293. Jackson v. Johnson, 5 Cowen, 24 La Frombois v. Jackson, 8 Cowen, 589. Jackson v. Hill, 5 Wendell, 532.

(b) Vide Jackson v. Burgett, 10 Johns. Rep. 457. Jackson v. West, 10 Johns. Rep. 466. Jackson v. Winslow, 9 Cowen, 13. Jackson v. Page, 4 Wendell, 585. Tuttle v. Jackson, 6 Wendell, 213.

John Haring, a witness, testified, that the *Fosters* were in possession of the premises, a year or two before the date of the agreement with *Thorn*, but under whom they claimed title he could not say, but supposed it was under one *Carpenter*, who claimed to be the owner; that the title to the lot was frequently questioned; that the defendant had said that he had doubts or fears about the title. About three years before the trial, the witness went to *Virginia* to purchase the lot of *Bonnell*, for the occupants; *Bonnell* was at *Clarksburgh*, and refused to convey the lot, saying that he had conveyed to *Goodyear*. The witness, on his return, informed *Grover* of the answer of *Bonnell*.

Abraham Foster testified, that he entered on the land without title; that he spoke to *Joseph Grover* to procure a title, who told him, about a year afterwards, that *Thorn* had a title from the soldier *Bonnell*.

Another witness testified, that he told the defendant that *Goodyear* had all the title to the premises which was necessary; and that the defendant, on the 12th April, 1810, said that he never believed in his former title.

The defendant gave in evidence a deed from *Bonnell* to the defendant and the other occupants, of the whole of lot No. seventy-two, dated 29th September, 1808, and recorded the 12th October, 1808, having been proved and acknowledged, on the day of its date, before a notary public, in *Harrison* county, in *Virginia*. *Joseph Grover* was a witness to the execution of this deed, which expressed a consideration of five hundred dollars.

**Jabez Gould*, testified, that *Grover* requested him to go to *Virginia* and buy the lot, and said, that from all accounts, *Goodyear* had got the right soldier.

A verdict was taken for the plaintiff, by consent, subject to the opinion of the court, on a case containing the above facts.

Sill, for the plaintiff. The lessors of the plaintiff having shown a regular paper title, the only questions are, 1. As to a subsisting adverse possession at the time of the conveyance; and, 2. As to the effect of the prior registry of the deed from *Bonnell* to the defendant.

1. The possession commenced under *Foster*, who entered without any claim of title. To constitute an adverse possession, it must be adverse at its commencement, and so continued. A person who enters without claiming title, is deemed to hold for the rightful owner. (1 Johns. Rep. 156. 6 Johns. Rep. 218. 2 Sch. & Lef. Rep. 97.) Prior to the deed to *Goodyear*, the lessor, there was no person in possession, pretending to hold under a deed. There was nothing more than a contract for a deed, from a person who had no title.

Again, both parties, in this case claim under *Bonnell*; and there can be no adverse possession where both persons claim under the same title. (4 Johns. Rep. 230. 12 East, 153.)

2. The prior registry of the deed to the defendant cannot avail him; since he had *notice* of the deed to *Goodyear*, at the time of the purchase; for *Grover* must be deemed to be the *agent* of the defendant; (8 *Johns. Rep.* 140;) and there was a direct notice to him of the deed to *Goodyear*, before the purchase. (3 *Ves. jun.* 478.)

Russell, contra. 1. As to the adverse possession, the true inquiry is, how the tenant held at the time of the deed to the lessor. If he claims to hold under a title different from, or hostile to that of the lessor, it is sufficient. No matter whether such title be valid or spurious. In *Jackson v. Todd*, (2 *Caines' Rep.* 133. S. C. 6 *Johns. Rep.* 267,) the defendant came into possession under *Cady*, who held under an agreement with *Isaacs*.

A person who holds possession under an agreement for a deed, may set it up in his defence against an action of ejectment. (*Yea v. Bucknell*, *Cowp.* 473. *Burr. Rep.* 2209.) If a possession is given under a contract for a deed, though it is only an equitable title, it is good as against the owner; but if he give a deed to a third person, such person, having the legal as well as *equitable title, must prevail against him who has only an equitable title.

2. The deed from *Bonnell* to the defendant was first registered. The act (sess. 17. c. 1) declares all deeds relating to the military bounty lands, which are not recorded, fraudulent and void against a subsequent purchaser, for a valuable consideration, unless first recorded. The deed from the patentee being first recorded, nothing can defeat its preference; not even a *notice*, for the language of this act is different from that relative to the registering of mortgages. If a party who has a deed for a valuable consideration, gets it first recorded, it will be valid. If a *notice* is to have any effect, it must be clearly proved, and be direct, fair and *bona fide*. The notice was to *Grover* not to *Sharp*, and at the time of the notice to *Grover*, *Goodyear* disclaimed holding under the deed, which was concealed. A notice, under these circumstances, can have no effect. Besides, *Grover* was the agent of *Thorn*, not of *Sharp*, who never had notice.

Cady, in reply, observed, that to render the case analogous to that of *Jackson v. Todd*, it should have been shown that there was a deed from *Bonnell* to *Thorn*. If *Thorn* had entered, declaring that he had a deed from *Bonnell*, when, in fact, he had none, his possession would not have been adverse. Though *Thorn*, supposing he should get a deed from *Bonnell*, promised to convey to *Foster*; yet *Bonnell*, though he had covenanted to convey to *Thorn*, might give a deed to *Goodyear*, who would have a valid and legal title.

It must be inferred, from the facts in the case, that *Grover* went to *Bonnell* as the agent of *Sharp*, who must, therefore, be charged with the notice to his agent.

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Per Curiam. To entitle the plaintiff to recover upon this case, two propositions must be established ; 1. That the deed from *Bonnell* to *Goodyear* was not void by reason of an adverse possession existing at the time ; 2. That notice of that deed destroyed the effect of the prior registry of the deed from *Bonnell* to the defendant.

1. When the patentee, *Bonnell*, executed his deed to *Goodyear*, the defendant was in possession, under a covenant from *Stephen Thorn* to the *Fosters*, to convey to them the premises, upon a *consideration to be paid. The *Fosters* entered upon the premises, without title, as one of them confessed, and he spoke to *Grover*, the agent of *Thorn*, to procure a title. When he first spoke to *Grover*, the latter did not say that *Thorn* had any title ; but, about a year afterwards, *Grover* told him that *Thorn* had a deed from the soldier *Bonnell*. The defendant entered under an assignment of the covenant to the *Fosters*. Whatever pretence or color of title the defendant had, at the time of the execution of the deed to *Goodyear*, it was avowedly under *Bonnell*, the patentee. The original possession by the *Fosters* being without any pretence of title, was to be deemed the possession of *Bonnell*, the true owner ; and I think it would be carrying the doctrine of adverse possession beyond the authorities, and beyond the truth of the case, to consider the covenant of *Thorn*, who said, or, what is the same thing, whose agent said, that he held under *Bonnell*, as amounting to an ouster of *Bonnell*, and an act in denial of, and in hostility to, his right. What kind of right or title *Thorn* pretended to have from *Bonnell* does not appear. His right might have been under a mere covenant or contract to convey, such as he afterwards made with the *Fosters* ; and we have no ground to infer that he had any better pretension, when *Bonnell* conveyed to *Goodyear*, in September, 1807. It is a settled rule, that the doctrine of adverse possession is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner. It is not unusual for persons to contract to convey at a future day, in expectation of a capacity to convey by the given day, though they have no title at the time of the contract. The *Fosters* were originally in possession, in judgment of law, under *Bonnell* ; and they never meant to change that character, and to oust *Bonnell*, by taking the covenant from *Thorn*. They took it, undoubtedly, under the impression that *Thorn* then was, or would thereafter be, authorized to convey the title of *Bonnell* ; and the defendant, as the assignee of the *Fosters*, must be deemed to have succeeded to the possession under the same impression. *Thorn* was never in possession, and, of course, there was no adverse possession to be imputed to him. *Fosters* and the defendant held possession, without setting up any adverse title, and under a con-

tract for a title to be derived from *Bonnell*. To consider **Bonnell* as thereby disseised or dispossessed of his freehold, and to have lost his capacity to convey the land, is inadmissible. Adverse possession, so as to defeat the conveyance of the true owner, must be made out, clearly and positively; and so the court said in the case of *Wickham v. Concklin*, (8 *Johns. Rep.* 220.)

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2. The next question is, whether this deed was superseded by the subsequent deed from *Bonnell* to the defendant, of *September*, 1808, and which was first recorded.

There is no doubt that if a subsequent purchaser has notice, at the time of his purchase, of a prior unregistered deed, it is the same to him as if it had been registered. It is not a secret conveyance by which he can be prejudiced or defrauded; and if he purchases with knowledge of such prior deed, and with the expectation of getting his deed first registered, he does an act against good conscience, and in abuse of the statute, which was made to prevent, and not to protect, fraud. It is, therefore, a well settled principle, that such notice supplies the place of a prior registry, and the only question here is, whether the defendant is chargeable with such notice.

In *July*, 1808, and about three months before the defendant's deed, *John Haring* went, as an agent for the defendant and the other occupants of the lot, to purchase the lot of *Bonnell*. *Bonnell* refused to sell, and told him that he had already conveyed the lot to *Goodyear*, one of the lessors of the plaintiff. Here, then, was a direct and positive notice to the agent of the defendant. *Haring* communicated this fact to *Joseph Grover*, who, in *September* following, went, as agent for the defendant, and the other occupants, to purchase, and succeeded in his mission. It is to be inferred that *Grover* was the agent also of the defendant, and, as such, made the purchase, because he had before acted as agent for *Thorn*, in selling the lot, and because he applied to *Gould* to go to the patentee and make the purchase, and, lastly, because we find him in *Virginia* at the time of the purchase, and a witness to the execution of the deed. No doubt he was the agent who made the purchase, and from whom the deed was afterwards received. Here we have then notice of the prior deed given to two successive agents of the defendant, and both employed for the very purpose of making the purchase. The notice in each case was direct and positive, and given prior to the purchase. Can we possibly doubt, after this, whether the knowledge of the prior *deed was communicated from these agents to their principal, and especially by the first agent, whose object was defeated, in consequence of the very fact of the prior deed? The defendant confessed, in 1810, that "he never believed in his former title." But we need not bring home the notice to the defendant, for it is a well settled rule, that notice to the agent is notice to his principal. This has been

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frequently so ruled, in respect to the very question of a prior unregistered deed, and in respect to the agent employed to effect the purchase. (*Le Neve v. Le Neve*, 3 *Atk.* 646. 1 *Ves.* 64. *Amb.* 436. S. C. *Lord Forbes v. Deniston*, and other cases therein cited, 13 *Vesey*, 120.)

We are, accordingly, of opinion, that the plaintiff is entitled to judgment.

DOE, *ex dem.* CLINTON AND OTHERS, *against* PHELPS.

Where a deed was executed, in 1767, which recited a power of attorney, from six of the grantors, for the whole of a patent, and the lands in the patent were proved to be generally held under and according to that deed; it was held, that after the lapse of 44 years, the execution of the power of attorney would be presumed. (a)

THIS was an action of ejectment, and was tried at the last circuit, in *Schoharie* county, before Mr. Justice *Spencer*. The plaintiff claimed the north part of lot No. twenty-nine, in a patent granted the 11th *October*, 1765, to *Frederick Young* and nineteen others, for 20,000 acres of land, in the town of *Sharon*. At the trial, the lessors gave in evidence, 1. An exemplification of the patent; 2. A deed, dated 9th *September*, 1766, from *John S. A. Glen*, *John Cuyler*, *Garrit A. Lansing*, and *Henry C. Cuyler*, to *Peter Dubois*, for *four-twentieth* parts of the said tract; 3. A deed, dated 14th *May*, 1767, from *Philip Livingston*, *Peter Dubois*, *Alexander Colden*, *Frederick Young*, for himself, and also as attorney for *Cornelius Ten Broek*, *Abraham Yates*, jun. *Nicholas Oxinier*, *Adam Young*, and *Johannis Keplier*, to *Anthony Van Dam*, reciting the power of attorney from them to the said *Frederick Young*, accompanied with a map of the premises, for the whole patent; 4. A deed, dated 2d *September*, 1767, from *Anthony Van Dam*, reciting the previous conveyances, to *Peter Dubois*, for lots No. four, seventeen, forty-three, five, sixteen, forty-two, six, fifteen, fifty, seven, fourteen, and nine, each containing four hundred acres; and 5. A deed, dated 3d *November*, 1772, from *Peter Dubois*, in which his trustees were joined, to *Walter Franklin*, under whom the lessors derived title, for lot No. nine, and twelve other lots. The lessors are the heirs at law of *Walter Franklin*.

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**Jabez D. Hammond*, a witness testified, that the defendant did not pretend to claim a title to the premises; that the lots in the patent to *Young and others*, were generally held under, and according to, the deed from *Anthony Van Dam*; that there are two lines run on the northern boundary of the patent, the distance between which is about eight chains; that the corner trees of lot No. nine, are not to be found, and the defendant claimed a right to the space between the two lines, opposite to lot No. nine, &c.

The witnesses for the defendant testified, that part of the defendant's farm had been improved twenty-three years; that the northwest corner of lot No. nine, which is the northeast corner of lot No. eight, was marked in the south of the two

(a) Acc. *Doe v. Campbell*, 10 *Johns. Rep.* 475. And see *Jackson v. Lamb*, 7 *Cowen*, 431. *Jackson v. Russell*, 4 *Wendell*, 513. *Jackson v. Moore*, 13 *Johns. Rep.* 513

lines above-mentioned. One *Keyes* formerly held land opposite to lot No. nine, and improved it up to the south line, before he leased the alleged intermediate space, or *gore*, to the defendant. The lot adjoining No. nine, is held up to the north line, as are all the lots eastward, on *Crosby's* patent. The defendant possessed the intermediate space, under *Keyes*, about nine years. The possessors of lot No. nine, have claimed that space, as a *gore*, and the two lines appeared to be about the same age.

The plaintiff, though called on for that purpose, did not produce a power of attorney to *Frederick Young*, from any of the patentees, nor did he produce any other deed than those above-mentioned.

A verdict, by consent, was taken for the plaintiff, subject to the opinion of the court, on a case containing the above facts; the judge, on account of his relationship to the lessors, declining to give any opinion on the points raised.

Van Buren, for the plaintiff.

Cady, contra.

Per Curiam. The lessors of the plaintiff showed an undisputed title, under the original patent of 1765, to seven-twentieth parts of the premises. The defendant sets up no title, nor does he show any adverse possession sufficient to bar the plaintiff's right of recovery. The lessors of the plaintiff likewise show a further right to six-twentieth parts of the premises, provided the conveyance to *Van Dam* from *Young*, as attorney to six of the patentees, was by due authority. This deed bears date the 14th *May*, 1767, and it recites a power of attorney from six of the patentees, *and it was in proof that the lands in the patent were generally held under title derived from *Van Dam*. The deed to *Van Dam* was from other patentees, besides those for whom *Young* assumed to act as attorney, and it purported to be a conveyance of the whole patent. After a lapse of forty-four years, and when the possessions have gone along with the deed to *Van Dam*, and when no pretence of claim in opposition to that deed has been heard of, the execution of the power of attorney recited in the deed of 1767, may reasonably be presumed. An ancient deed, with possession corresponding with it, proves itself; and a power of attorney contained in such deed, and necessary to give it validity, or full effect, will equally be embraced by the presumption.

The deed to *Van Dam* was for the whole patent; but no right appeared upon the face of it, nor is any shown otherwise, to more than thirteen-twentieth parts of the patent, and for so much and no more, the plaintiff is entitled to judgment.

Judgment accordingly.

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A remitted 500l. to B. in London, to pay a bill for the same sum, drawn by his attorney C. on B., pursuant to an agreement between them. The bill having been presented for payment before the funds had reached the hands of B., it was returned protested. Afterwards, another bill for 112l. 10s., drawn also

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by C. as attorney of A. in favor of D., was presented to B., who accepted and paid it, out of the 500l. which had in the mean time come to his hands.

It was held, that though the 500l. was placed in the hands of B. for a specific purpose, yet C. had no right of action against D. to recover back the money paid to him, but must look to the other parties, to rectify the mistake, if any was made. (e)

(e) The principles connected with this subject are discussed much at large by the Supreme Court of Pennsylvania in the case of *Bogart v. Nevius*, 6 Serg. & Rawls, 361, where Ch. Justice Tilghman recognizes the rule that an action for money had and received cannot be supported against a person who has received a just debt without fraud.

DEY against MURRAY.

THIS was an action of *assumpsit*. The cause was tried before the *Chief Justice*, at the *New-York* sittings, in *December*, 1810.

The plaintiff read in evidence the following writing: "*New-York*, 10th *December*, 1807, *Anthony Dey* having drawn in favor of *George W. Murray*, four bills of exchange, as the attorney for *Richard S. Hackley*, at one hundred and twenty days after sight, for one hundred and twelve pounds ten shillings sterling, on *Thomas Mullet & Co.* of *London*. It is understood and agreed, that if all or either of the said bills should not be accepted or paid, he is not to be responsible for the payment of the same, or any damages, interest, costs or charges, that may arise or accrue thereon; the same bills having been drawn to facilitate *the payment of five hundred dollars, which *George W. Murray*, as bail for *Richard S. Hackley*, has paid for him in a suit brought by *John Knox* against the said *Hackley*, and which has been compromised, and to which compromise I have given my assent, as the best arrangement, under all circumstances, that could be made, *G. W. Murray*;" also a certificate, signed by *George W. Murray*, dated the 12th *December*, 1801, as follows: "On the 10th day of *December*, 1807, *Anthony Dey*, as the attorney of *Richard S. Hackley*, drew a set of exchange payable to the undersigned *George W. Murray*, on *Thomas Mullet & Co.* of *London*, at one hundred and twenty days after sight, for one hundred and twelve pounds ten shillings sterling, which was for one half of the compromise that was made of *John Knox's* claim against the said *Richard S. Hackley*, and for which amount the said *Richard S. Hackley* was to provide payment, by remitting the same with a similar amount to the said *Mullet & Co.* And which said set of exchange I acknowledge was duly paid and carried to the credit of my account with the said *Thomas Mullet & Co.* on the 31st day of *March* last, out of a sum of five hundred pounds sterling, which *Richard S. Hackley* had previously remitted to the said *Thomas Mullet & Co.* to pay *Anthony Dey*, as will more fully appear from an extract of *Thomas Mullet & Co.'s* letter to me, dated *London*, 7th *September*, 1808, as follows: 'We do not see that we ever mentioned to you, that we had accepted the one hundred and twelve pounds ten shillings you remitted as drawn by Mr. *Dey*. We did so on the 31st of *March*, having then determined to accept another bill for the same sum which with yours had been suspended. The fact is, Mr. *Dey* drew five hundred pounds, one hundred and twelve pounds ten shillings, and one hundred and twelve pounds ten shillings. The first bill went back for want of funds from *Hackley* or *Meade*. After it was returned, a re

mittance of five hundred pounds came. We tried to stop the bill, but it was too late to do so, and we then considered it was our duty to accept the two others, which we accordingly did. Mr. *Dey* is very angry with us, and accuses us of a collusion with you, in this business, which is very singular, as we only treated you as we did the holder of the other bill, (a perfect stranger,) and if we had done worse for you, than for a stranger, it would have been singular indeed. We mention this at large, that you may know what to reply, should Mr. *Dey* speak to you on the subject.' ”

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It appeared that, in a conversation between the plaintiff and defendant, the plaintiff said to the defendant, “ You are perfectly *satisfied that you have been paid five hundred dollars on account of *Knox's* business, out of my money, that was not remitted for that purpose, but which belonged to me, and that it has not been refunded; ” to which the defendant replied, that he knew he had been paid out of the defendant's money, but the defendant must look to *Mullet & Co.* and settle the matter with them.

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On this evidence, the *Chief Justice* nonsuited the plaintiff; and a motion was, afterwards, made to set aside the nonsuit.

Wells, for the plaintiff, contended, that on principles of natural justice, the case was strongly in favor of the plaintiff. The moment the five hundred pounds was placed, by *Hackley*, in the hands of *Mullet & Co.*, to meet the bill drawn by *Dey*, it ceased to be the money of *Hackley*, and he had no control over it. It was subject to the order of *Dey* alone, as much as if it had been placed in a bank, payable to his order. On receiving the money, *Mullet & Co.* became the agents or bailees of *Dey*. If an agent wrongfully, or through mistake, pays the money of his principal, the latter may recover it back from the person to whom it has been paid. (*Cowp.* 806. *Doug.* 637. *Bull. N. P.* 35.) It was no answer to say that the plaintiff might resort to *Mullet & Co.*; for he still had a right to consider *Mullet & Co.* as the agents of the plaintiff, and as having paid the money wrongfully.

Colden, contra, insisted, that the argument on the part of the plaintiff amounted to no more than that *Mullet & Co.* had paid the money out of the wrong heap. But no matter from what fund the money has been paid, if the defendant had a right to receive it. The general principle laid down in the books cited, is not denied; but it must be taken with the fact, that the person who received the money had no right to it. This cannot be pretended in regard to the defendant.

Per Curiam. The bills of exchange drawn in favor of the defendant being paid by *Mullet & Co.* on whom they were drawn, and paid too out of moneys transmitted to them by *Hackley*, the drawer of the bills, the defendant is not bound to refund the money to the plaintiff. It cannot be maintained that the money so paid was the plaintiff's money, merely be-

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cause *Hackley* had previously remitted money to *Mullet & Co.* to pay the plaintiff. The specific money had no *earmark*. The mistake, if any, *must be rectified between *Hackley*, the plaintiff, and *Mullet & Co.* There was no privity between the defendant and those parties in that negotiation. The plaintiff must look to *Mullet & Co.* or *Hackley*, and not to the defendant. This case is analogous, in principle, to that of *Rogers v. Kelly*, (2 *Campb. N. P.* 123.)

Motion to set aside the nonsuit denied.

SMITH, *ex dem.* TELLER AND OTHERS, against BURTIS
AND WOODWARD.

In an action of ejectment, the plaintiff, after relying on the possession and descent cast, offered to prove a seisin in fee of 25-32 parts of the premises; and it being supposed unnecessary to show a paper title, as the defendant relied solely on an adverse possession of 20 years, the plaintiff offered to show that *B.*, whose possession was relied on, as adverse, entered, claiming to be tenant in common under the same title. It was held, [* 175]

that this evidence was admissible, without requiring the plaintiff, at the same time, to admit the fact, that *B.* was a tenant in common with him.

To constitute an adverse possession, it is not necessary that there should be a rightful title. It must, however, be a possession under color and claim of title,

THIS was an action of ejectment, to recover a house and lot of ground, in the fifth ward of the city of *New-York*. (See *S. C.* vol. 6. p. 197.)

The cause was tried before the *Chief Justice*, at the *New-York* sittings, in *December*, 1810. The plaintiff proved that *Isaac Teller* entered into possession of the premises, claiming the same as his own, some time between the years 1760 and 1765, and erected a brick house thereon, in which he lived with his family, until the month of *June*, 1775, when he died in possession of the premises; that *Isaac Teller*, at the time of his death, had five children, to wit, *John*, his eldest son, *Henry*, his second son, one of the lessors of the plaintiff, and *Mary*, (who intermarried with *Peter Thalkimer*,) *Remsen* and *Isaac*, the other lessors of the plaintiff; that the widow and children of the said *Isaac Teller*, deceased, remained in possession of the premises, until the *British* army took possession of the city of *New-York*, when they were compelled to leave the same. *John*, the eldest son, died in the month of *December*, in the year 1777, aged between twelve and fifteen years. The plaintiff farther proved, that after the *British* troops entered the *city of *New-York*, in the year 1776, they took possession of, and occupied, the buildings and premises in question; and on the application of a judgment creditor, *Isaac Teller*, since deceased, permitted him, for thirty guineas, to take possession of, and appropriate to his own use, the materials of the buildings, which were sold by him, and out of the proceeds thereof he retained the amount due him, and a few years since paid the balance to *Henry*, one of the lessors of the plaintiff.

Michael Ortley, a witness on the part of the plaintiff, testified, that the house occupied by *Isaac Teller*, before the war stood on the ground now in the possession of the defendant, that during the war, the house was pulled down by the *British* troops; and the ground on which it stood remained vacant, after the war, and until 1791, when the witness left the city. Three other witnesses testified to the same effect.

John Leonard, a witness, also testified that *Henry R. Teller* was eight or nine years old, at the time of his father's death. Since the late war, *Theophilus Beekman* put a house on the premises. Before the war, *Teller* had three houses on the premises: the middle house was of brick, the other two of wood. The brick house stood opposite a house since occupied by Mr. *Brewerton*. The *Beekman* house was placed on part of the ground where the *Teller* house had stood, including the ground occupied by the wooden houses, which were nearest to *Chamber-street*, and a part of the ground occupied by the brick house. On the north of the houses of *Teller*, on *Broadway*, was a house, before the late war, called the *Ackerman* house, and to the north of which was another, called the *Kip* house.

The plaintiff having rested on this evidence, the defendants' counsel moved for a nonsuit, which was overruled by the judge.

The defendants, among other things, relied on an adverse possession of the premises, for more than twenty years prior to the commencement of the suit.

Peter Tom, a witness, testified, that in *August*, 1786, he went into possession of the *Beekman* house, under *Theophilus Beekman*, to whom he paid rent; and that he occupied the house a year and nine months. He particularly described the situation of the *Beekman* house, and stated that the house of the defendants in question, was where the *Beekman* house formerly stood, which had a yard in front, enclosed by a fence, in part along *Broadway*; *and another yard in the rear, also enclosed by a fence. Several other witnesses corroborated his testimony, as to the place where the *Beekman* house stood, and its relative situation.

A Mrs. *Benson* went into possession of the *Beekman* house, in 1791, and paid rent to *T. Beekman*, until 1794, when she moved into the *Kip* house. The *Beekman*, *Ackerman*, and *Kip* houses adjoined each other, and had yards, enclosed with fences.

Catharine Beekman moved into the *Beekman* house in *May*, 1786, and lived there until *August*, in the same year, and her husband, *Harman Beekman*, paid rent to *Theophilus Beekman*. She also confirmed the statement of the other witnesses, as to the situation of the house, and testified that the house of the defendants stands on the same ground.

Catharine Henry, about twenty-two years before the trial, lived in the *Beekman* house a year, and paid rent to *Theophilus Beekman*. *Catharine Fink* also lived in the same house, some time after the war, and her husband paid rent to *Theophilus Beekman*; and, from the tax book of the collector, it appeared that her husband was assessed, as tenant of the *Beekman* house, in 1789. A receipt of the carpenters who placed the *Beekman* house on the lot in question, for their

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and exclusively
of any other
right. (a)

And if *B.* enters claiming as tenant in common, under the same title as that of the lessor, it admits the title of the lessor, so that neither *B.*, nor those claiming under him, can set up such entry as adverse to the common title, or injurious to the rights of the other tenants in common. (b)

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(a) Vide *Jackson v. Wheat*, 18 Johns. Rep. 40. *Jackson v. Newton*, 18 Johns. Rep. 355. *Jackson v. Woodruff*, 1 Cowen, 276. *Jackson v. Camp*, Id. 605. *Jackson v. Brink*, 5 Cowen, 483. *La Frambois v. Jackson*, 8 Cowen, 589. *Clapp v. Bromagham*, 9 Cowen, 530. But see *Jackson v. Frost*, 5 Cowen, 346. *Jackson v. Hill*, 5 Wendell, 532.

(b) Acc. *Jackson v. Creal*, 13 Johns. Rep. 116. But though a tenant in common enter without claiming adversely to his co-tenant, his possession may afterwards become adverse by some notorious act or claim of title. *Jackson v. Brink*, 5 Cowen, 483. And see *Jackson v. Whitbeck*, 6 Cowen, 632. *Clapp v. Bromagham*, 9 Cowen, 130.

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labor and materials found, was produced, bearing date the 14th November, 1785.

The defendants also produced a deed of partition, dated the 6th January, 1795, between *Henry H. Kip*, *Abraham I. Van Vleck*, *John* and *Samuel Kip*, of the first part; the trustees and executors of *Samuel Bayard* and *Theophilus Beekman* and his wife, of the second part; *Isaac Van Vleck*, of the third part; and *Daniel Denniston*, of the fourth part; by which deed commissioners were appointed to make partition of a certain tract of land, in the city of *New-York*, claimed by the parties, as tenants in common, into eight parts; and *Isaac Meade*, one of the commissioners named in the deed, testified, that the partition was made in 1795, according to that deed, and the premises in question were included in the shares drawn by *Daniel Denniston*, and that soon afterwards, improvements on the premises were commenced.

The defendants then proved a regular chain of conveyances, from *Daniel Denniston* to the defendants, accompanied with actual possession of the premises, since *January*, 1795, and that valuable improvements had been made on the property.

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*Several witnesses for the defendants testified their belief, from an early acquaintance with *Henry R. Teller*, that he was forty-five or forty-six years of age, at the time of the trial.

On the part of the plaintiff, several witnesses testified that *Henry R. Teller* was about forty-two years of age.

C. Swart testified, that after the *Teller* family were compelled, by the *British*, to leave the houses they occupied, she took possession of one of them; that she was the sister of *Isaac Teller's* widow, and took possession under that family, though she had no license or permission for that purpose. The house she occupied was called the *Ackerman* house.

Another witness testified that the property possessed by *Isaac Teller* before the late war, was for some time vacant, after the war, and that there were no fences near the *Beekman* house.

Several witnesses also testified as to the situation of the *Beekman* house; and that it was not enclosed with fences; and that the ground occupied by the brick house of *Isaac Teller* remained vacant until about the year 1794, or 1795. *William Lewis*, one of the witnesses, said, that he returned to the city in 1791, and soon after that time, he took several loads of broken bricks out of the cellar of the brick house which had been occupied by *Isaac Teller*, before the war; that the lot on which that house had stood was then vacant, and there was no fence about it; and the property continued vacant for some time.

The counsel for the plaintiff then offered to prove that *Isaac Teller*, the elder, was seised in fee of 25-32 parts of the premises in question, &c. This was objected to by the counsel for the defendants; and after some conversation between

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the judge and the counsel, the judge intimated that as the lessors had, on the first day, rested on the possession of *Teller* and the descent cast, and which was ruled to be sufficient, in the first instance, to recover, and the defendants had not set up any title, but rested upon the defence of an *adverse* possession for twenty years, it was useless to go into a paper title; for if the defence set up was made out, it would be a bar to any title, and if not made out, the plaintiff would be entitled to recover on his first showing.

The plaintiff's counsel then offered to prove that *Theophilus Beekman* entered, in 1786, claiming to be a *tenant in common*, under the same title. The judge asked the counsel for the lessors of the plaintiff, if they coupled that offer with an admission *that *Beekman* was a tenant in common with them; and observed, that if they admitted that fact, he would admit the proof, otherwise not; for unless they admitted *Beekman* to be a tenant in common with them, it would not alter the case, as the plaintiff could not avail himself of such an entry as enuring to his benefit. The counsel for the plaintiff refusing to make the admission, the evidence was rejected, and a bill of exceptions was tendered.

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The judge stated to the jury, that unless there was an *adverse* possession of twenty years, after the plaintiff came of age, and before the commencement of the suit, the plaintiff ought to recover; and that in his opinion, the evidence was in favor of such adverse possession. The jury found a verdict for the defendants.

A motion was made for a new trial. 1. Because the verdict was against evidence.

2. Because the evidence offered by the plaintiff was improperly rejected.

3. Because the judge misdirected the jury.

4. On account of newly discovered evidence.

The affidavit of newly discovered evidence stated, that since the trial, the plaintiff had discovered several witnesses, who would prove that they resided near, and were well acquainted with the premises, after the late war, and that they were not included in any enclosure made by *Theophilus Beekman*; but were vacant, after the war, until the year 1795; and that the attempt of the defendants to prove, at the trial, an adverse possession of twenty years by *Theophilus Beekman*, was a *surprise*, and the lessors could not have been prepared with the testimony to prove the fact of the vacancy of the premises after the war, until 1795.

The case was argued by *Hoffman* and *T. A. Emmet*, for the plaintiff, and *Griffen* and *J. Radcliff*, for the defendants.

But, in reference to the decision of the court, it is thought unnecessary to state the arguments of counsel.

SPENCER, J. On the argument, two points were chiefly relied on, for a new trial; 1. The discovery of material evidence

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since the trial, as to the location of the premises, connected with the allegation of surprise; and, 2. The overruling of evidence that *Theophilus Beekman* entered in 1796, claiming to be a tenant in common, under the same title with the plaintiff.

*The view I have taken of the second point, renders it unnecessary for me minutely to consider the first; though, from a careful review of the testimony, it appears to me that the weight of evidence is against the verdict. The fact testified to by *William Lewis*, is a strong and almost decisive one. He swears, that in 1791, or shortly after, he took several loads of broken bricks out of the cellar of the brick house occupied by *Isaac Teller*, before the war, and that the lot was then vacant and unfenced. It appears to me that a new trial would throw light on the question, and that it is fit and discreet to have a re-examination before another jury.

The plaintiff offered to show that *Isaac Teller*, under whom the lessors of the plaintiff have deduced a title, was seised in fee of 25-32 parts of the premises. This was objected to, and the judge intimated an opinion, that it was unnecessary, as the defendants relied solely on an adverse possession, and the plaintiff had already proved enough to recover, but for the adverse possession. The plaintiff then offered to prove that *Theophilus Beekman* entered in 1786, claiming to be a tenant in common under the same title; and the case states, that the chief justice asked the counsel for the plaintiff, if they coupled that offer with an admission that *Beekman* was a tenant in common with them, and that if they admitted that fact, he would admit the proof, otherwise not, assigning as a reason that unless the plaintiff admitted *Beekman* to have been a tenant in common with him, it would not alter the case, as the plaintiff could not avail himself of such entry, as enuring to his benefit. The counsel for the plaintiff refusing to make such admission, the evidence was rejected, and a bill of exceptions tendered.

In determining the propriety of rejecting the evidence, as to the manner of *Beekman's* entry, we must not lose sight of the fact, that *Beekman's* possession was relied on by the defendants, as constituting a material portion of the time necessary to make the adverse possession, relied on by the defendants, as a bar to the plaintiff's recovery.

The plaintiff, too, had offered to show title, as a tenant in common, to 25-32 parts of the premises; and thus admitted that with respect to 7-32 parts, there were other persons tenants in common with the lessors. It appears to me that the plaintiff ought not to have been required to admit the fact that *Beekman* was a tenant in common. To constitute an adverse possession, there must be a possession, under color and claim of title; but *Beekman's* entry, claiming as tenant in common under the same title as that of the lessors of the plain-

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tiff, qualified his entry and admitted the title of the lessors ; so that neither *Beekman*, nor the defendants, could set up that entry, as adverse to the common title, or as injurious to the rights of the other tenants in common. A possession, for ever so long a time, stripped of the circumstance that it is unaccompanied with the claim of the entire title, will not amount to an adverse possession, barring those who have the real and legitimate title. When, therefore, *Beekman* evinced, by his acts and declarations, that he did not mean to usurp the possession to himself, but that he entered in subserviency to the same title, and as a tenant in common, his possession lost its adverse character, as regarded all those who had right and title in the premises.

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It has never been considered as necessary to constitute an adverse possession, that there should be a rightful title. Whenever this defence is set up, the idea of right is excluded ; the fact of possession, and the *quo animo* it was commenced or continued, are the only tests ; and it must necessarily be exclusive of any other rights.

The most that could have been imposed on the lessors of the plaintiff, to entitle them to the full benefit of *Beekman's* admissions and declarations, would be to subject them to take those declarations as evidence, as well for as against *Beekman*, and thus leaving it to the jury to decide, whether, in point of fact, he was not to be considered as entering and having right as a tenant in common. But most clearly, the plaintiff ought not to have been required to admit any fact, as a prerequisite to giving the evidence of *Beekman's* declarations.

I think this point too clear to require being any further pursued ; and that a new trial ought to be granted, with costs to abide the event of the suit.

VAN NESS, J. and YATES, J. were of the same opinion.

KENT, Ch. J. (dissenting.) The motion for a new trial is made upon the following grounds : 1. That the verdict is against evidence ; 2. That the judge overruled testimony which ought to have been received ; 3. The discovery of new evidence since the trial.

*1. In the discussion of the first point, a question arose on the construction of the statute of limitations, as to the time allowed a party, whose right accrued during his disability, to make his entry and bring his suit, after the disability had ceased. Our statute upon this subject is the same as the act of 21 Jac. I. c. 16. s. 1, 2. (*Laws*, v. 1. 563.) (a) and the better opinion is, that the party has, in every event, twenty years to make his entry ; and if under disability during any part of that time, he has ten years, and no more, after the disability ceases. It may so happen, that the twenty years and more will elapse during the disability, and then ten years will be afterwards allowed cumulatively, or the disability may cease so far within the period of the twenty years, as to allow of only twenty years in

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(a) 2 R. S. 293.
1. 7 Id. 295. s.
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the whole, though part of that period be covered by the disability. This construction does not allow to persons laboring under disability, the same number of years after they become of competent ability, as it allows to other persons who were under no such disability. Such is the policy and the very language of the statute, for it did not mean, as in the case of the limitation of personal actions, that the party should, at all events, be allowed the full period of twenty years after the disability had ceased; because the words of the act are explicit that the extension of the time of making the entry, beyond the twenty years, is in no case to exceed ten years after the disability is removed. This is also the amount of the doctrine contained in the case of *Doe, ex. dem. George, and Frances his wife, v. Jesson*; (6 *East*, 80;) for there, the whole period, from the time that the right descended, or accrued, to the time of bringing the suit, was but twenty years, and above ten of the first years of that time had been consumed by an acknowledged disability, and yet the right of entry was held to be tolled by lapse of time.

But this question does not necessarily arise in the present case, and, therefore, what has been said is not to be considered as a definitive opinion upon the point. If *Teller* was dispossessed in 1785, the twenty years of the statute had not only expired, but twenty years after he came of age; and if he was not ousted until 1795, then twenty years had not, and have not, to this moment elapsed. The principal matter of fact then is, was here an adverse possession in 1786? for if that fact be established, there is no just ground from the case to question the other fact found, that *Henry R. Teller* was of age twenty years before suit brought, which was not until *January*, 1808.

If an adverse possession existed in *May*, 1786, there was sufficient evidence of an unbroken continuation of such possession *down to 1795, when the existence of an adverse possession under the deed of partition is not disputed.

It is not easy to reconcile, and it would be a tedious and useless labor to analyze and compare every part of the testimony on the subject of the *Beckman* possession. It was my impression at the trial, when I understood the facts better than I can now from the case, and it is my impression still, that the evidence warrants the conclusion, that the possession taken under *Theophilus Beckman*, in 1786, was adverse to the claim of the lessors of the plaintiff, in respect to the *quo animo* with which it was taken, and as to the whole extent of the premises. *Beckman* exercised acts of ownership from *May*, 1786, by leasing the premises, and taking the rents, and he had caused the house to be moved on to the premises, and paid for the labor and materials as early as *November*, 1785; and, in 1795, he was party to a deed of partition of the premises, from which a regular title to the defendants was deduced.

ment with which possession is taken and held, is to be inferred from circumstances, and those circumstances are matters of fact for a jury. A subsequent act will explain a preceding entry : as where a parcener entered into the whole of a vacant possession, and made a feoffment in fee. (*Co. Litt.* 374. a.) Taking the circumstances of the case together, we are naturally led to the conclusion that *Beekman* entered, in 1786, and held adversely to the right of *Teller*.

It must be extremely difficult to attempt, now, to locate, with perfect precision and certainty, the extent of the *Beekman* possession. Within the last twenty years, the adjoining streets, lots and buildings have undergone such alterations, that we cannot now recognise any of the ancient features of that part of the city. The ground in controversy lies in the most busy and valuable part of *Broadway*. *Washington-Hall* is erected on the spot where the *Ackerman* house, adjoining the *Beekman* house, formerly stood. The lots adjoining, and including the premises, and including the *African* burying ground, for many years since the *American* war, were regarded as uninviting suburbs. The streets have since been widened, the face of the ground wholly changed, and it is now covered with a flourishing population, and elegant improvements ;

——— *rara domorum*
Tecta vident ; quæ nunc, &c.

We are not, therefore, to be surprised, that the testimony of witnesses should differ, and be contradictory, relative to the exact *location of the *Beekman* house, and how far, and in what direction, it was visible to the spectator, as he was coming up *Chamber-street*. These inquiries must have been better understood by the jury, at the trial, than they can now be by the court, upon the case ; and especially as the jury bestowed two days in a patient investigation of the fact. I thought, at the trial, that the weight of evidence was in favor of the conclusion that the adverse possession, by *Beekman*, including the yard around his house, as well as the house itself, rested on the very spot of the original possession of *Teller* ; and considering the improvements which have since been made, under the *Beekman* possession and title, and the inconvenience, if not hardship, in giving effect to a dormant title, in the face of such *bona fide* and immense improvements, I think it would not be discreet to send the cause to a second trial on such a doubtful point of fact, and in favor of such a dormant title.

2. The next point is, whether there was a mistake of the law, in rejecting the evidence offered by the plaintiff of the claim under which *Beekman* entered. It appears to me, upon subsequent reflection, that I was not mistaken, at the trial. The entry and possession of one tenant in common will enure as the entry and possession of his companion, unless he enters,

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claiming the whole, and in exclusion of his co-tenant. But this rule is founded upon the fact of an actual tenancy in common existing between the party entering and the party claiming the benefit of that entry. It grows out of the privity of estate; and here the lessors of the plaintiff refused to admit such privity, and thereby precluded themselves from the benefit of such entry. The statement of the point appears to me to suggest, of itself, the true conclusion of law.

The admission of a tenancy in common, under the same title, is not an admission that the plaintiff partook of that title. Nothing is more common, than for adverse parties in ejectment to claim under the same title; yet the entry of one party is not the entry of the other, but upon the assumption that they are co-tenants in the same title and interest. They may be sharers in that interest in very different degrees and proportions, but still there must be a co-tenancy to establish the privity.

3. The last ground of the motion, is the discovery of several new witnesses, relative to the contested point of the adverse possession, and that the setting up of an adverse possession, at the trial, was a surprise upon the plaintiff. There is no just pretence for this part of the motion. The lessors of the plaintiff were *bound to be prepared, at their peril, to meet the question of adverse possession, as well as every other legal defence; and it appears that they met this defence by a number of witnesses. To allow a new trial merely that the party may multiply witnesses to a point already litigated, and when it does not appear but that such witnesses might have been discovered and had, upon the former trial, by ordinary diligence, would be against the settled principles and practice of the court. The decisions on this point are uniform and numerous. (*Steinbach v. Columbian Insurance Company*, 2 *Caines' Rep.* 129. *Smith v. Brush*, 8 *Johns. Rep.* 84. *Jackson v. Roe*, 9 *Johns. Rep.* 77.)

I am, accordingly, of opinion, that the motion be denied.

THOMPSON, J. I concur in granting a new trial, on the ground that the verdict is against evidence. The material and turning point on the question of adverse possession, related to the site of what is called the *Beekman* house. This house appears, from the evidence, to have been built in the year 1785; and if it stood on the same place where *Teller's* brick house formerly did, a twenty years' adverse possession was clearly made out, otherwise not. After such a lapse of time, and the material and important alterations which that part of the city has undergone, the inquiry must be, in some measure, vague and uncertain, especially where recourse is had to the mere recollection of witnesses, without any particular facts to direct them in the location. Four witnesses, on the part of the plaintiff, swear very positively that the premises in question were vacant in the year 1791. If so, the

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Beekman house could not have stood there. About the same number of witnesses on the part of the defendants, appear to swear, with equal confidence, that the defendants' house now stands where the *Beekman* house formerly did. The opinion of these witnesses seemed to be formed, in a great measure, from their impressions, as to its relative situation, from houses on the opposite side of the street, as also by a reference to *Chamber-street*. The almost total changes in these objects must render the opinion very uncertain. I place my judgment, principally, upon the testimony of *William Lewis*, a witness on the part of the plaintiff. He relates a fact, which, if true, is conclusive to show, that the *Beekman* house did not stand upon the site of the *Teller* brick house. He swears, that in the year 1791, or shortly after, he took *four or five loads of broken bricks out of the cellar of the brick house, occupied by *Isaac Teller before the war*; that the lot on which that house stood was vacant, and continued so for some time. The credibility of this witness was not called in question. And I am not able to surmount the conclusion, necessarily arising from this fact, that the *Beekman* house could not have stood on the site of the *Teller* brick house. In direct opposition to which, however, the verdict of the jury was found.

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2. With respect to the rejection of the evidence, offered at the trial, of a tenancy in common, I concur with the *Chief Justice*. The adverse possession relied upon by the defendants, was that which had been derived from *Theophilus Beekman*; and the offer on the part of the plaintiff to show that he entered as a tenant in common, was for the purpose of destroying the hostile character of his possession. But it would not have that effect, unless he entered as a tenant in common with the plaintiff. The possession of one tenant in common enures to the benefit of his co-tenants, by reason of the privity of estate. And the offer to show that *Beekman* entered as a tenant in common under the same title, does not imply any privity of estate between him and the lessors of the plaintiff, unless he entered as tenant in common *with them*. Who *Beekman's* co-tenants in common were, was not offered to be shown. They might have held under a title hostile to the plaintiff; and if so, the testimony offered would have been nugatory. The general and qualified offer to prove that *Beekman* held under the *same title*, was too vague and indefinite. All parties, in one sense, held under the same title, as all titles are derived from the government; and parties often hold under the same title, in a less remote sense, and still hold adverse to each other. All privity of estate may have been severed at a remote period, and the holding become adverse. Whether *Beekman* entered as a tenant in common with others, or in his own right, was perfectly immaterial, unless he entered as a tenant in common with the lessors of the plaintiff;

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this was the only point of view in which his entry could enure to their benefit, and this the plaintiff refused to admit. The testimony, in any other point of view, would have been irrelevant, and, of course, was properly rejected.

New trial granted.

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***THE MARINE INSURANCE COMPANY OF NEW-YORK
against THE UNITED INSURANCE COMPANY.**

The cargo and freight of a vessel were separately insured, by different underwriters, from Bordeaux to New-York. The vessel having performed eighteen nineteenthths of her voyage, was captured, on the 23d October, 1806, and carried into Halifax, where she and her cargo were libelled in the vice-admiralty court, as prize, and further proof ordered. A. a merchant at Halifax, obtained an appraisement of them, and became security, by bond, to answer the amount; and the property was, thereupon, delivered to him. He took new bills of lading

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for the cargo, in his own name, and shipped it in his own name, in the same vessel, consigned to B. his own agent in New-York, with directions to deliver the cargo to C. the owner, on his indemnifying A. for his bond, and all expenses, which

THIS was an action for money had and received to the use of the plaintiffs. A verdict was taken, by consent, at the *June* sittings, in the city of *New-York*, for a nominal sum, subject to the opinion of the court, upon the following case; the amount to be adjusted upon such principles as the court might direct, in case judgment should be given for the plaintiffs.

In the year 1806, an open policy of insurance was underwritten by the defendants, on the interest of *William Wood*, in the cargo of the ship *Enterprize*, amounting to 12,000 dollars, from *Bordeaux* to *New-York*. The residue of the cargo, owned by other persons, amounted to 14,000 dollars. The plaintiffs underwrote a policy on the freight of the same vessel, for the same voyage, valued at 2,500 dollars, for *Wood*, the owner of the vessel, which was worth 9,000 dollars. She sailed on the voyage insured, and when she had performed eighteen-nineteenths of her voyage, she was captured, on the 23d of *October*, 1806, and sent into *Halifax*. The assured thereupon, on the 23d *February* following, abandoned on both policies, which abandonments were not accepted; but a total loss was, afterwards, paid on the cargo policy, as hereafter stated. The vessel and cargo were libelled in the court of admiralty at *Halifax*, as prize, and further proof ordered: whereupon the house of *Forsyth, Smith & Co.* obtained an appraisement of the vessel, and of *Wood's* part of the cargo, on behalf of the owners, and became security, by bond, to answer to that amount. The decree which might be given, and the property, were ordered to be delivered to them. They took new bills of *lading of *Wood's* part of the cargo, from the captain, in their own names, and shipped it in the same vessel, to *New-York*, consigned to their own agents, *Lenox* and *Maitland*, with directions to deliver it to *Wood*, on his paying the expenses, and sums already advanced, by *Forsyth, Smith & Co.* and fully indemnifying them against the security, or bond given by them; but *Wood* refused so to do; and *Lenox* and *Maitland* insured, on account of *Forsyth, Smith & Co.*, the cargo so shipped to *New-York*, at the office of the *Commercial Insurance Company*. The vessel and cargo, which had been thus bonded, proceeded on her voyage to *New-York*. During the voyage she was stranded, shipwrecked, and wholly lost on the *American* coast. *Lenox*

and *Maitland*, having heard of her disaster, sent out lighters, by which the cargo was saved, brought to the city of *New-York*, and there delivered to *Lenox* and *Maitland*, who sold it, prior to the 1st of *April*, 1807. Further proofs were forwarded to *Halifax*, and on the 1st of *April*, 1807, the vessel, and *Wood's* part of the cargo, were liberated. On the 21st of *June*, 1807, the defendants paid to *Wood* a total loss on the cargo policy, and the plaintiffs paid a total loss on the freight policy. The net proceeds of the sales, made by *Lenox* and *Maitland*, amounted to 12,824 dollars and 5 cents, of which they paid to the defendants, in *July*, 1807, the sum of 6,524 dollars and 52 cents only, refusing to pay more, claiming to deduct, and actually deducting, the whole of the expenses incurred on both vessel and cargo at *Halifax*, charged and paid by *Forsyth, Smith & Co.* there, amounting to 3,677 dollars 71 cents, that sum forming a general average; and also the expenses of saving and transporting the cargo to *New-York*, equal to 2,737 dollars and 97 cents, together with one hundred and eight dollars and eighty-four cents, for interest. The amount of freight, for *Wood's* share of the cargo for the whole voyage, would amount to 1,146 dollars and 66 cents. The plaintiffs claimed, as the salvage of the defendants, a *pro rata freight* of that part of the cargo, from *Bordeaux* to *Halifax*, which, calculated upon five-sixths of the voyage, would be nine hundred and fifty-five dollars and fifty-five cents, and upon eighteen-nineteenths, 1,086 dollars and 31 cents.

The defendants contended that the plaintiffs were not entitled to recover of them any freight; but if any, it could only be the proportion which the proceeds of the cargo actually received bear to the whole freight, on the original value of the cargo, insured by the defendants, or a *pro rata* freight on 6,524 *dollars and 52 cents, being the amount actually received by the defendants as aforesaid; or, at most, the plaintiffs could not recover more than a *pro rata* freight, on the 12,824 dollars and 5 cents, deducting the general average expenses, being 3,677 dollars and 71 cents.

It was agreed, that if the court gave judgment for the plaintiffs, they should also decide whether the defendants were bound to pay interest, and if so, the same should be added to the amount to be recovered.

Bristed, for the plaintiffs, contended, 1. That a *pro rata* freight had been earned; and, 2. That it belonged to the plaintiffs.

1. It was stated as settled law, by this court, in the case of *Robinson v. The Marine Insurance Company*, (2 *Johns. Rep.* 323. 2 *Caines' Rep.* 21,) that where a vessel is forced into an intermediate port, and is unable to proceed to her port of destination, and the goods are received by the owner, at such intermediate port, freight is due for them, *pro rata itin-eris*. The equitable principle laid down in the case of *Luke*

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C. refused to do.

In February, 1807, the cargo and freight were abandoned to both underwriters, who paid a total loss, the 21st June, 1807. On producing further proof the vessel and cargo were liberated, on the 1st April, 1807. The vessel, on her voyage from *Halifax* to *New-York*, was stranded and lost; but the cargo was saved and delivered to the consignee at *New-York*, who sold it at auction, and paid the net proceeds, after deducting all the expenses at *Halifax*, &c. to the insurers on the cargo.

In an action brought by the

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insurers on the freight, against the insurers on the cargo, it was held, that no *pro rata freight* was due, the act of *A.* at *Halifax*, in receiving the cargo, being an act of necessity, done by a stranger, for the benefit of all concerned; and there must be a voluntary and unconditional acceptance, by the owner, at the intermediate port, to form the basis of a new contract

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to pay a *ratable*
freight. (a)

The accept-
ance of the net
proceeds of the
cargo, by the in-
surers, after a-
bandonment,
forms no ground
for a claim of
freight against
them. The in-
surer on the car-
go has nothing
to do with the
freight. (b)

(a) The whole
class of cases
resting on the
authority of *Luke*
v. *Lyde*, 2 *Burr*,
882, proceed on
the ground that
there is a volun-
tary acceptance
of the goods
themselves at an
intermediate
port, not a com-

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pulsive receipt
from the hands
of the admiralty
after capture and
condemnation,
and ultimate re-
stitution on ap-
peal. *Case v.*
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Co. 7 *Cranch*.
362. *Vide Brad-*
hurst v. Col. Ins.
Co. supra, 17.

(b) As between
the assured and
the underwriter
on the cargo, the
latter is in no
case responsible
for the payment
of freight, wheth-
er there be an a-
bandonment or
not. It is a
charge on the
cargo, against
which he does
not undertake to
indemnify the
owner. *Case v.*
Baltimore Ins.
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v. *Lyde*, (2 *Burr*. 882,) so often cited, has been adopted in this court. It is also a settled principle, that an abandonment once rightfully made, has relation back to the cause of loss, and takes effect from that time; (*Marsh. on Ins.* 601. 9 *Johns. Rep.* 1—8. 1 *Johns. Cases*, 377;) so that the master, or person taking charge of the property, is to be deemed, after such event, the agent of the insurer. Is not the acceptance of an abandonment of the goods, equivalent to an acceptance of them at the intermediate port? And must not the insured, as the assignee of the owner, stand in his place, and be equally bound to pay the freight? If not, still the facts in this case amount to such an acceptance of them; for the intermediate transactions must be considered as carried on by the *agents* of the insurers.

2. If, then, a *pro rata* freight has been earned, it belongs to the plaintiffs, to whom the whole has been abandoned by the ship-owner, and to whom they have paid a total loss. Though, in *England*, the rights of the different sets of underwriters, in such case, seem not to be fully settled; (*Park*, 227—236. *Marsh.* 601—608. 4 *East*, 34. 3 *Bos. & Pull.* 479. 7 *East*, 24. 9 *East*, 378;) yet, from the principles laid down by this court, there can be no doubt that, by the law of this state, the insurers on the freight, not the ship-owners, after an abandonment, are entitled to the freight earned. (See *United Ins. Co. v. Lenox*, 1 *Johns. Cases*, 377. S. C. 2 *Johns. Cases*, 543. 3 *Caines' Rep.* 16. 245. 251. 7 *Johns. Rep.* 432. 3 *Johns. Rep.* 49.)

Hoffman, contra, insisted, that not a case was to be found in which it had been decided, that a *pro rata* freight was due at an intermediate port, where the *acceptance* of the goods was not *voluntary*. *In the case of *Luke v. Lyde*, the freighter voluntarily accepted his goods, after the recapture. To make the owner or insurer liable for freight of goods, received at an intermediate port, the reception there must be voluntary, and not cast upon the owner or insurer by any peril or necessity. If the owner of the ship becomes incapacitated to carry on the goods to the port of destination, the acceptance of them, at the intermediate port, is *ex necessitate*, and involuntary.

The broad principle deduced from the decision in the case of *Luke v. Hyde*, if not shaken, is, at least, narrowed, by the later decision in the Court of K. B. in the case of *Liddard v. Lopes*. (10 *East*, 526.) By what was said in that case, and in *Cook v. Jennings*, (7 *Term Rep.* 138,) the true sense of the opinion of Lord *Mansfield*, in *Luke v. Lyde*, seems to be clearly understood and settled. The liability of the *freighter* to pay a *ratable freight* for the goods, rests wholly on his *voluntary acceptance* of them at the intermediate port. The principle of the case of *Liddard v. Lopes*, has been recognised and adopted by the Supreme Court of *Pennsylvania*, in the case

of *Amroyd v. The Union Company*, (3 *Binney's Rep.* 437,) after a full examination of all the authorities on this subject.

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Again, whatever may be the law as to *pro rata* freight, whenever the ship-owner parts with his goods, his *lien* for the freight is gone; for though the *contract*, as between him and the original *freighter*, may remain, yet the delivery of the goods to a third person, or purchaser, raises no implied contract to pay the freight.

The ship-owner must resort either to his *lien* on the goods, or to the original *contract* of affreightment, in order to obtain his freight.

In *Baillie v. Modigliani*, (*Marsh. on Ins.* 728,) it is stated by Lord *Mansfield*, as a principle, that "as between the insured and the underwriters on the *cargo*, it is a contract of indemnity, and the latter have nothing to do with the *freight*." The present action is an attempt by the owner, *Wood*, to make his insurers pay freight. As owner of the ship, he gets all his *freight*. If he has thought proper to deliver the goods, without demanding the freight, the insurers cannot claim it. After the defendants have received freight, under the decisions of this court, as respects the rights between the two sets of underwriters, can the ship-owner, *Wood*, or his insurers, the plaintiffs, recover that freight of the defendants?

Colden, in reply, observed that this court, in the case of **Robinson v. The Marine Insurance Company*, after hearing all the cases cited, and a learned argument, had declared that it was now too late to dispute the law as laid down in the case of *Luke v. Lyde*. On the principle of that case, it cannot be denied that a *pro rata* freight was earned.

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But the acceptance, in the present case, must be deemed voluntary. The defendants were not bound to accept the abandonment. When a peril happens that justifies an abandonment, and an abandonment is made and accepted, every person acting in regard to the property insured, must be deemed the agent of the insurers. Messrs. *Forsyth, Smith & Co.* became the agents of the defendants, and their acceptance of the goods was the same as if they had been received by the defendants. This point was expressly decided in the case of *The United Insurance Company v. Lenox*.

Suppose there had been no insurance on the *goods*, and *Wood*, by his agents, had received them at *Halifax*, could not the plaintiffs, to whom the *freight* had been abandoned, call on him to account for the *pro rata freight* due at *Halifax*? And have they not the same right now to call on the defendants, who are substituted in the place of *Wood*, to account for that freight? Suppose the insurers on the goods, after the abandonment, had sued *Wood* for them, could they recover the whole amount, without deducting the *pro rata freight*?

Per Curiam. The question first to be considered is, whether any freight was earned, or became due to the ship-

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owner, for if it be once admitted that there was such an acceptance of the cargo, as to entitle the ship-owner to freight, the rule by which this freight is to be apportioned, appears to be settled with us, by the case of *The United Insurance Company v. Lenox*. (1 *Johns. Cases*, 377. 2 *Johns. Cases*, 443.) The principle contained in the final decision of that case is, that the freight, prior to the loss, goes to the ship-owner, or to his representative, the insurer on freight, to whom it was abandoned, and that the freight earned subsequent to the time of the loss goes, on abandonment, to the underwriter on the ship; and it appears to be understood that his claim to such subsequent freight would prevail over that of the insurer on the freight. (1 *Caines' Rep.* 578. 3 *Caines' Rep.* 20, 251. 3 *Johns. Rep.* 55. 7 *Johns. Rep.* 432. *Park*, 6th edit. 228. 236.) *The question, however, does not arise here between the insurers on ship and on freight; and if freight was due in this case, the plaintiffs would be entitled to a ratable proportion, and no more. But no freight was earned in this case; there was no delivery of the cargo at *New-York*, the port of destination; the ship was shipwrecked and lost, and the consignees of the cargo, as shipped from *Halifax*, and not the ship-owner or his agent, saved it and brought it into port. The earning of entire freight is not pretended by the case, and the claim is founded wholly on the acceptance of the cargo at *Halifax*. But there was no acceptance there on which to raise an *assumpsit* to pay freight. After the vessel and cargo had been libelled by the captors, they were redeemed by the house of *Forsyth, Smith & Co.* on appraisement, and security given for the value; and the cargo was consigned by them to *Lenox* and *Maitland*, of *New-York*, their own agents, to be delivered to the owner on payment of an indemnity. *Wood*, the owner, refused to accept of the cargo, or to ratify the acts of *Forsyth, Smith & Co.* There never was any acceptance of the cargo by the owner or his authorized agent. The act of *Forsyth, Smith & Co.* at *Halifax*, was an act of necessity, done by strangers, for the best interest of all concerned, and without prejudice to either party; but there must be a voluntary and unconditional acceptance by the owner, at the intermediate port, to form the basis of a new contract to pay a ratable freight. (10 *East*, 376. 526. 2 *Campb. N. P.* 466. 1 *Condy's Marshall*, 231. a. note. 3 *Binney*, 437.) The acceptance of the net proceeds of the cargo by the defendants, formed no ground for a claim for freight. These proceeds belonged to them, as insurers of the cargo, after paying a total loss, and there was no *lien* for freight attached to that cargo. The insurer on the cargo has nothing to do with the freight of it; and it would be a most forced construction to deduce a promise to pay freight from the acceptance by the insurer of the salvage or remains of the cargo.

Judgment for the defendants.

*VOS AND LIGHTBOURNE *against* ROBINSON.ALBANY,
August, 1812.Vos
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THIS was an action on a policy of insurance on the schooner *Maria*, "at and from *Port Plata*, *St. Domingo*, to *New-York*." The plaintiffs claimed for a total loss, which was averred, in the first count of the plaintiffs' declaration, to have happened as follows: "While the said vessel was at *Port Plata* aforesaid, to wit, at *Isabella*, within the district of *Port Plata*, she was, by and through the violence of the winds, &c. forced and cast upon rocks, and bars there, and was, then and there, broken, shattered, bilged and totally lost." In the second count, the plaintiffs averred, that while the vessel was at *Port Plata*, she was, by the force of winds, &c. totally lost.

The cause was tried at the *New-York* sittings, before Mr. Justice *Thompson*, the 15th *June*, 1811.

Thirty days previous to the commencement of the suit, the agent of the defendant, and the other underwriters on the same policy, received from the plaintiffs the protest of the captain of the vessel, stating the loss; but the register of the vessel was not then produced, nor until it was given in evidence at the trial, by which it appeared that she belonged to *Vos*, one of the plaintiffs. When the protest was shown to the underwriters, they made no objection to the sufficiency of the preliminary proof; but refused to pay for a total loss, on the ground of a deviation.

The vessel sailed from *Port Plata*, on the 30th *November*, 1809, to go to *Susua*, to procure mahogany there. Her papers were left at the marine office at *Port Plata*, and a permit was granted her to go to *Susua*, for her cargo, and it was necessary for her to return to *Port Plata*, in order to obtain a clearance for *New-York*. After leaving *Port Plata*, the vessel *was carried, by adverse winds and currents, twelve leagues to the westward of that place; and arrived at *Isabella*, on the 6th *December*, and there took in additional ballast, and put to sea, in order to reach *Susua*, but was again driven back to *Isabella* on the 8th *December*. She again sailed for *Susua*, but was again forced back, and put into *Isabella*, on the 10th *December*, where she was shipwrecked in a violent storm. The harbor of *Susua* and port of *Isabella*, are both in the district of *Port Plata*.

The district of *Port Plata* extends from the river *St. Juan* near the *Old Cape*, to the river *Massaue* near *Fort Dauphin*. The whole district is called *Port Plata*. The custom-house or marine office, for the whole district, is at *Port Plata*, where all the inhabitants of the district do duty at the fort. The chief produce of the district is mahogany and fustic, and these woods are procured along the coast.

Cargoes are never taken on board at *Port Plata*, but vessels always enter at that port and proceed to *Susua*, which is

Where the insured claimed for a total loss of a vessel, and 30 days previous to the commencement of the suit, exhibited the protest of the captain, to prove the loss; but not the register or other proof of interest, to the underwriters, who made no objection to the proofs, but refused to pay, solely on the ground of a deviation, it was held, that this was an admission of the plaintiffs' interest, or, at least, a waiver of the necessity of producing proof of it. (a)

A vessel was insured "at and from *Port Plata*, *St. Domingo*, to *New-York*," and in going from *Port Plata* to

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Susua, which is in the district, bearing the name of *Port Plata*, and about 18 miles east of the port, in order to take in a cargo of mahogany, she was driven into the road or bay of *Isabella*, in the same district, and there lost. She had a permit from the custom-house at *Port Plata*, to go to *Susua*, to ob-

(a) Vide note (a) to *Johanson v. Columbian Ins. Co.* 7. *Johns Rep.* 315.

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tain her cargo, and would have been obliged to return to *Port Plata* to pay the duties, and get a clearance, such being the usual course of trade there. The custom-house and port of entry are confined to the particular place called *Port Plata*, and the district, for the purposes of revenue, which bears that name, extends nearly a hundred miles along the coast of *St. Domingo*. *Port Plata* is a safe har-

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bor, but *Susua* and *Isabella* are open roads, and dangerous while particular winds prevail. It was held, that *Port Plata* proper, and the district of *Port Plata*, were different objects, and the perils distinct; and that the going from *Port Plata* to *Susua* was a deviation. And that nothing but a clear, well settled and well understood usage of trade, would be sufficient to include both objects, under the simple name of *Port Plata*. (a)

(a) Vide *Dickey v. Baltimore Ins. Co.* 7 Cranch, 337. *De Longueville v. New-York Fire Ins. Co.* 10 Johns. Rep. 120.

about four leagues east, or along the coast, to procure their cargoes, and then return to *Port Plata* to pay the duties, and obtain a clearance. That port is a good harbor, and has anchorage ground. *Susua* and *Isabella* are both open roads or bays. *Isabella* is about eighteen miles west of *Port Plata*. *Susua* is about eighteen miles east of that place; and when the wind is from the northwest or north, it is difficult to get out to sea, and there is great danger of being driven on shore. The vessel had made about half her passage to *Susua*, when she was driven to leeward, by an easterly wind, and forced into port *Isabella*.

Two sea captains, one of whom had been above eighteen months at *Port Plata*, and both were acquainted with the district and coast, testified, that the district of *Port Plata* is so called, because there is no other port of entry or custom-house within it. *Samana* is the next port of entry, which has, in like manner, a district of country attached to it. The city of *St. Domingo*, which is another port of entry, forms another district; and these are the only ports of entry in the *Spanish* part of the island, which is divided into districts, in reference to the custom-house duties; each being a revenue district, and taking its name from the port of entry within it. The witnesses did not consider a vessel arriving at *Susua* or *Isabella*, as arriving at *Port Plata*, to which place she must actually go; and if desirous to proceed to any other place *within the district, she must obtain a permit from the custom-house for that purpose.

Several underwriters and officers of different insurance companies, in the city of *New-York*, testified, that they had frequently insured vessels engaged in trade to the city of *St. Domingo*, and if the insured wished to load on the coast, it was the practice to insert express permission in the policies for that purpose; and that for granting such a permission, an additional premium was demanded.

It appeared also, that it was very rarely, if ever, that a cargo of woods could be obtained at *Port Plata*; but it was the course of the trade, to go along the coast to obtain cargoes.

A verdict was found for the plaintiffs, subject to the opinion of the court, on a case containing the above facts.

*Antho*n and *Hoffman*, for the plaintiffs, contended, that the defendant having refused to pay, solely on the ground of a deviation, he had admitted the sufficiency of the preliminary proofs. (7 *Johns. Rep.* 315. 8 *Johns. Rep.* 607.)

As to the alleged deviation, they contended, that the plaintiffs had merely pursued the usual custom of the trade, in going from *Port Plata* to *Susua* to obtain a cargo. The custom of the trade was peculiar, on account of the particular form and situation of the coast, and had been fully proved.

Underwriters are presumed to know the usage of the trade in which they insure, and are bound by such usage. (*Marsh.*

259—270.) In the case of *Noble v. Kenworthy*, (*Doug.* 492. 1 *Can.p. Rep.* 503,) Lord *Mansfield* said, every underwriter is presumed to know the practice of the trade he insures. If he does not know it, he ought to inform himself. It is no matter, if the usage has been but for a year.

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Again, in *Thellusson v. Fergusson*, (*Doug.* 346. *Marsh.* 355. 358,) Lord *Mansfield* said, that the words “at and from *Guadaloupe*,” comprehended the whole island, and protected the ship in going from port to port, round the coast of that island. So, in the present case, at and from *Port Plata*, comprehends the district of *Port Plata*.

Wells, contra, insisted, 1. That, as there had been no preliminary proof of *interest*, the plaintiffs were not entitled to commence their action.

2. The plaintiffs had averred in their second count, that the vessel was lost at *Port Plata*, which ought to have been proved. There is a particular port or harbor called *Port Plata*, which *gives its name to a *revenue district* of considerable extent. The port and district of *Port Plata* are as distinct from each other, as the port of *New-York* and the district of the port of *New-York*, under our *revenue laws*. The insurance in this case is, at and from the *port* or *harbor* of *Port Plata*, not from the *district* of *Port Plata*.

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Next, as to the usage of trade, in going along the coast to obtain cargoes. Usage of trade forms a part of the law of a country; and the law of a country is not to be proved by witnesses accidentally picked up in the street. Only two of the witnesses, casually met with, had ever been on the coast.

Marshall (*Marshall on Ins.* 307. and *Condy's* note. *Winthrop v. Union Ins. Co. ib.*) says, “Witnesses may be examined to prove a *usage* explanatory of a clause in the policy; but their opinion of its meaning is not evidence.”

Again, “The force of usage is not to destroy the law. Usage is to be consulted only where the law is doubtful. Where the law is clear, it must prevail. The law is permanent, but usages sometimes change, and often disappear with the circumstances which gave them birth.”

The trade to *Port Plata* is a *recent* trade for *American* vessels. This appears to have been the first vessel from the *United States*, engaged in that trade. The presumption of a knowledge of the usage of the trade cannot, therefore, be fairly brought home to the defendant. And *usage of trade* is allowed to govern, merely because parties are presumed, from the circumstances, to know it, and form their contracts accordingly. In *Smith v. Wright*, (1 *Caines' Rep.* 43. 45. and see *Martin v. Delaware Ins. Co. Condy's Marshall*, 186, note 20,) the court said, “The true test of commercial usage is, its having existed a sufficient length of time to have been generally known, and to warrant a presumption that contracts are made in reference to it.”

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The testimony as to the uniform practice, in insuring the trade to the city of *St. Domingo*, shows that where it is intended to trade along the coast, a permission is inserted in the policy, but not without an additional premium. The port and district of *Port Plata* are different places, and must be accompanied with very different risks.

Per Curiam. The two points raised upon this case, are,

1. That the preliminary proof was not sufficient.
2. That there was a deviation, and the vessel lost in consequence of it.

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*1. The protest of the captain, stating the loss, was produced to the agent of the defendant. The register, proving the plaintiff's interest in the vessel, was not produced, but as the underwriter made no objection to the deficiency of the preliminary proof, and placed his refusal to pay, specifically and solely on the ground of deviation, he must be deemed to have admitted the plaintiff's interest in the vessel, or to have waived the necessity of producing the proof of it.

2. The question on the merits is, whether going to *Susua* was not a deviation. The voyage insured was *at and from Port Plata, St. Domingo, to New-York*; and the vessel was shipwrecked and lost in going from *Port Plata* to *Susua*. She had a permit from the government at *Port Plata* to go there, for her loading of mahogany, and would have been obliged to return to *Port Plata* for her clearance. This *Susua* is a bay or open road, about four leagues east of *Port Plata*, and is dangerous when certain winds blow; and it is included within the district of *Port Plata*, which district stretches for one hundred miles along the north coast of *Spanish St. Domingo*. The very statement of the fact is enough to show, that sailing from *Port Plata* to *Susua* was not sailing from *Port Plata* to *New-York*, for *Port Plata* and the revenue district of *Port Plata*, are very distinct objects, and the custom-house and port of entry are confined to *Port Plata* proper. The perils must be very distinct, and very greatly increased between a vessel sailing from *Port Plata* to *New-York*, and from *Port Plata*, along that extensive and dangerous coast, which the district embraces, and then to *New-York*. Nothing short of a most clear and well settled, and well understood usage, would be sufficient to include both objects in the simple name of *Port Plata*. On this point the evidence in the case is decidedly against any such usage or understanding of the trade. It would appear, from the case, that a liberty to trade on the coast included in the district, would not be granted without an increased premium, and would require a special clause for the purpose.

The defendant is, accordingly, entitled to judgment.

Judgment for the defendant.

*CRAIG *against* WARD.ALBANY,
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The mere possession of a personal chattel, with the consent of the true owner, will not render the chattel liable to the debts or disposition of the reputed owner; but there must be a fraudulent or deceptive purpose in view, or implied from the special circumstances of the case.

Where A. purchased a livery stable, &c. and delivered the possession to B. who carried on the business in his own name, but was to pay over all the moneys received to B. who was to allow B one-third of the net proceeds, or clear profits, and A. afterwards bought a coach which he delivered to B. and which, afterwards, while in the possession of B. was taken in execution by a creditor of B, it was held that the property in the coach did not pass to B. and unless his possession of it was fraudulent, and intended for colorable

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purposes, it was not liable to his creditors. (a)

(a) Vide *M'Intosh v. Turner*, supra, 135. *Tompkins v. Haile*, 3 *Wendell*, 406.

THIS was an action of *trespass de bonis asportatis*, for seising and carrying away a *coachee* and three *horses*, the property of the plaintiff. The claim as to the *horses* was, however, afterwards, abandoned. The cause was tried at the *New-York* sittings, in *November*, 1811, before Mr. Justice *Van Ness*.

The plaintiff, in *May*, 1809, purchased of one *Gordon*, as agent of the estate of *Patrick Shay*, deceased, divers horses, carriages, &c., and a lease of certain stables in *Courtlandt-street*, forming what was called the livery-stable establishment, for which a bill of sale was given by the executors of *Shay*. The plaintiff paid four hundred dollars in cash, and gave three promissory notes for four hundred dollars each.

It was proved, that the plaintiff bought the *coachee*, or carriage, in question, of *Burtis & Woodward*, coachmakers, in *June*, 1809, for ninety dollars, which was afterwards put into the possession of *Jacob Crissy*, and was considered as part of the livery-stable establishment. The *coachee* and horses, which were established as a stage to run from *Poawles Hook* to *Brighton*, were attached at *Newark*, in *New-Jersey*, in *August*, 1809, at the suit of *Ward*, for a debt due to him from *Crissy*, and sold. The plaintiff put in a claim of property, which was tried before a sheriff's jury, in *New-Jersey*, who found the property to be in *Crissy*.

From the evidence on the part of the defendant, it appeared that *Crissy* had been in possession of the livery-stable establishment from the time it was first purchased by *Craig*, who had said that *Crissy* was to pay the notes given for the purchase, the rent and wages of the persons employed, &c.; that a sign was put up on which was written "*Crissy's Livery Stable*;" and a notice was published in the *gazette*, by which *Crissy* informed the public, that he had established a regular stage between *New-York* and *Brighton*, &c., and a similar advertisement was posted up in *New-Jersey*; and *Craig* admitted that he had drawn the advertisements. When the carriage and horses were seised under the attachment, the driver, at first, said they belonged to *Crissy*, but, afterwards, said they were the property of the plaintiff. The coachman was employed and paid by *Crissy*, and he testified that *Crissy* had the whole management of the establishment, which was conducted *in the name of *Crissy*, who paid the expenses; and that when the plaintiff wanted a horse, or carriage, he applied to *Crissy* for them.

The plaintiff gave in evidence an agreement made between him and *Crissy*, dated the 1st of *May*, 1809, which recited that *Craig* had that day purchased the livery-stable establishment of the executors of *Shay*, with the carriages, horses, &c. and

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taken a lease of the ground and stable, &c. "with the intent, and for the purpose of carrying on the business, &c. through the agency of *Jacob Crissy*, and had intrusted the same to the care and management of the said *Jacob Crissy*." *Crissy* then covenanted with *Craig* to take the care and management of the said carriages, horses, gigs, &c. and to enter into the occupation of the said stables, &c. and to carry on the said business in all its branches, to the best advantage, &c. for and on account of *Craig*, for and during the term of three years from the date of the agreement, and to account to *Craig*, monthly, during the term, for all moneys received, &c.; and *Craig* covenanted, that he would, monthly, and as often as he should receive from *Crissy* any sum or sums of money arising from the business, after deducting all expenses, rent and charges, incident to the establishment, pay to *Crissy* *one-third* of the *net proceeds*, or *profits*, received, &c.; which one-third of the net proceeds, or profits, was to go as a full compensation, or consideration, for *Crissy's* services, care and management of the stables, &c. during the said term of three years; and *Crissy* covenanted to keep regular books of accounts, which *Craig* was to have leave, at all times, to inspect.

The counsel, for the defendant moved for a nonsuit, on the ground, that in whomsoever the *property* in the carriage in question was, the *possession* of it, for the term mentioned in the agreement, was in *Crissy*, and that the plaintiff could not maintain the *trespass*. The judge was of that opinion, as it respected the horses; but as the carriage was purchased subsequent to the agreement, he thought that if *Crissy*, under all the circumstances of the case, was not to be deemed the *owner*, and the property, therefore, liable to pay his debt, he might be considered as the agent of *Craig*, who would, in judgment of law, be deemed to have the possession. The plaintiff's counsel contended that, even if the acts of *Craig*, and the *ostensible ownership* of *Crissy*, might have subjected the property to the creditors of *Crissy*, whose *debts accrued subsequent to his possession; yet the rule could not apply as to debts existing prior to such possession; as the creditors could not then be deemed to have trusted *Crissy* on the faith of the property. The judge expressed his doubts as to the correctness of this distinction; and charged the jury that if they believed that *Crissy* had such an ostensible ownership as would render the property liable to debts of creditors subsequently accrued, it would be liable to all.

The jury found a verdict for the plaintiff, for one hundred two dollars and sixty-six cents.

A motion was made to set aside the verdict, and for a new trial.

Slosson, for the defendant. To maintain trespass for goods, the plaintiff must have the actual or constructive possession,

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at the time of the alleged trespass. If he has not the actual possession, he must have a right to reduce them to his possession when he pleases. (*Putnam v. Wiley*, 8 Johns. Rep. 432. 4 Term Rep. 489. 7 Term Rep. 9.) By the agreement, *Crissy* was to have the possession for three years, so that the plaintiff could not claim it before the expiration of that time.

The carriage, it is true, was purchased after the agreement, but it was turned into the establishment, of which *Crissy* was to have the sole management. It was as much in his possession as any other article belonging to the establishment. Though the carriage did not pass by the agreement, yet that agreement shows the intention of the parties as to the property.

Again, the advertisement of *Crissy*, written by the plaintiff, shows it to be his property: The acts and declarations of the plaintiff recognise it as the property of *Crissy*, and he cannot, now, be permitted to gainsay those acts, and declarations, after *Crissy* may have obtained credit on the faith of the ownership.

T. A. Emmet, contra. At the time of the purchase by *Craig*, and the agreement with *Crissy*, the carriage was not in the possession of either party, for it was not then purchased. This case is different from that of *Putnam v. Wiley*, or *Ward v. Macauley*. It is, in fact, an attempt to extend the law of partnership to a most dangerous length. For there are very many useful public works and manufactories, on a similar establishment, carried on by confidential agents, who are to have a *per centage*, or portion, of the *net profits*, as a compensation for their services. The agreement *between *Craig* and *Crissy* contains no words of demise. It declares that the plaintiff had purchased the property, and had *intrusted Crissy* with the care and management of it. All the covenants are on the part of *Crissy*. The plaintiff merely promises to pay him his wages. *Crissy* was a mere servant, or agent, who was to receive a portion of the net profits, as a compensation for his services. *Crissy* had no *jus disponendi* in regard to the property. If *Craig* had been dissatisfied with the conduct of *Crissy*, and had turned him out of possession, the latter could not have maintained any possessory action against the former.

As to the point of *visible ownership*; the cases have gone no further than to say, that where a person, trusting to the visible ownership, has given a credit, he may set off the debt against the claim by the real owner, or principal; (*George v. Clagett*, 7 Term Rep. 359. *Rabone v. Williams*, *ib. note (a)* *Ross v. Dey*, *ib. note (c)*. 2 Esp. N. P. Cases, 469;) but none of them go so far as to allow an old and antecedent debt to be set off by the person claiming to be the real owner. The doctrine of partnership is not applicable to the present case: and if *Crissy* could have no right of action against *Craig*, if

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dispossessed by him, the creditors of *Crissy* could have no right to take the property in execution.

D. B. Ogden, in reply, observed, that the advertisements, drawn up by the plaintiff, as well as his declarations, showed, conclusively, that the livery-stable establishment belonged to *Crissy*, and that this carriage was delivered to him to form a part of that establishment.

Possession is the only *indiciu*m of property in personal chattels; and *Crissy* having advertised the property in his own name, with the assent of the plaintiff, the plaintiff cannot now claim to be the owner. The distinction between debts contracted before or after the visible ownership, is not to be found in the books. The case of *Ross v. Dey* (7 Term Rep. 361, *note*) supports the principle for which we contend. After the plaintiff, by his conduct, has led the defendant to believe that *Crissy* was the real owner, he cannot pull off the mask, and claim the property as his own.

Again, *Crissy* was to have *one-third* of the *profits*. Now a participation in the profits renders the person a partner, and if he was a partner, he had an interest which could be taken in execution.

Again, if *Crissy* had an interest in the property, it was liable to be attached in *New-Jersey*, and the right of property being *there* decided, the present action cannot be brought for the same property in this state.

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**Per Curiam.* The only question arising on this case is, whether the coachee, purchased by the plaintiff, subsequent to the articles of agreement between him and *Crissy*, and delivered into the possession of *Crissy*, was liable, as the property of *Crissy*, for his debts. The carriage was not embraced by the agreement, and might have been recalled by the plaintiff at any time. As to this article, *Crissy* was the mere agent or servant of the plaintiff. The property in the coachee did not, therefore, pass as between *them*; and unless the possession was fraudulent, and intended for colorable purposes, the coachee was not liable to the creditors of *Crissy*. The bankrupt law of 21 Jac. I. c. 19. s. 11, considers chattels so possessed by the bankrupt, and used by him as reputed owner, with the consent of the true owner, as liable to pay the debts of the bankrupt. But independent of any statute provision, the mere possession of a chattel will not, of itself, render the chattel liable to the debts or disposition of the possessor. There must be a fraudulent or deceptive purpose in view, or implied, under the special circumstances of the case. The jury by their verdict in this case, have negatived the suggestion of fraud; and the motion for a new trial ought to be denied.

Motion denied.

RIPLEY AND OTHERS *against*. GELSTON.ALBANY,
August, 1812.RIPLEY
v.
GELSTON.

THIS was an action of *assumpsit*. The cause was tried at the *New-York* sittings, the 5th *December*, 1811, before Mr. Justice *Van Ness*.

*At the trial, a bill of exceptions was tendered to the opinion of the judge. The following facts were stated in the bill. In *August*, 1809, a *Spanish* ship, called the *Maria Theresa*, on her voyage from *Havanna*, in the island of *Cuba*, to *London*, sustained very considerable injury, by a gale of wind, and put into the port of *New-York* in distress; where she arrived the 20th *September*, 1809, and was entered at the custom-house as a vessel *in distress*. On the 5th *October*, the cargo having been unladen, the officer of the customs, appointed to superintend the unloading, left the ship, which was afterwards condemned by the wardens of the port, as unfit to be repaired, and was sold by the agent of the *Spanish* owner, under the direction of the wardens, to the plaintiffs, on the 10th *November*, to whom a bill of sale, in the usual form, was executed by the agent of the owner, and in his name.

The plaintiffs caused the ship to be repaired, and, on the 5th *May*, 1810, she was cleared at the custom-house for a voyage from *New-York* to *Cadiz*. On obtaining the clearance, the plaintiffs, as *owners* of the ship, were required by the officers of the customs, to pay two hundred and sixty-six dollars and seventy-five cents, tonnage duty and light money for the ship; notwithstanding the plaintiffs, at the time of paying the money, objected to the payment of it, as illegal. The money was passed to the credit of the *United States*, in the cash book of the custom-house, on the 4th *June*, 1810.

The defendant, who is the collector of the customs for the port of *New-York*, within a few days after the 4th *June*, 1810, paid the sum of two hundred and sixty-six dollars and seventy-five cents, into the *Branch Bank of the United States*, in the city of *New-York*, to the credit of the treasurer of the *United States*, which was before the commencement of this suit. No *request* was made, or *notice* given, to the defendant, or any of the officers of the custom-house, at the time of paying the money by the plaintiffs, or afterwards not to pay over the money, or pass it to the credit of the *United States*.

It is not customary to demand any *tonnage duty* or *light money* of vessels arriving at the port of *New-York*, and entering at the custom-house, as vessels *in distress*; but if such vessels change their voyage, and clear out for a different port from that to which they were originally destined, tonnage duty and light money were demanded, on their obtaining a clearance for such new voyage, though the witnesses for the defendant could not recollect any particular instance in which such demand or payment had been made.

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A *Spanish* ship, bound from *Havanna de Cuba*, to *London*, having met with a violent gale of wind, put into the port of *New-York*, and was entered at the custom-house, as a ship *in distress*; having conformed to the regulations of the act of congress, (*Cong. 5 sess. 3. c. 128. s. 60.*) in such cases, she was condemned, after a regular survey by the wardens of the port, as unfit to be repaired, and, under their direction, was sold at public auction, and purchased by *American citizens*, who, at their own expense, afterwards repaired her, and fitted her out for a voyage to *Cadiz*: but the collector of the customs refused to give her a clearance, unless the new owners would first pay the tonnage duty or light money of 50 cents per ton, imposed on all *foreign* ships entering the ports of the *United States*. They objected to the demand as illegal, but paid it, and afterwards bro't an action of *assumpsit* against

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the collector, to recover back the money so paid. A few days after it was paid, and before the suit was commenced, the collector paid the money into the *Branch Bank of the United States*, to the credit of the treasurer of the *United States*: and no request was made, or notice given, by the plaintiffs, at any time, to the collector, or other officer of the customs, not to pay over the money, or to pass it to the credit of the *United States*. It was held, that no tonnage duty or *light money* was due, in this case; and, at any rate, it was wrongfully demanded of the plaintiffs, who having paid it *compulsorily*, they were entitled to their action against the collector to recover it back, without showing a notice to him not to pay it over to the government, especially, as there was no other person against whom the plaintiffs could bring their action.

Notice to an agent not to pay

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over the money to his principal, is not necessary, where the

**Baldwin*, for the defendant. 1. The defendant had a right to demand and receive of the plaintiffs, as owners of the ship, the money paid by them for tonnage duty or light money. By the act of congress (*Laws of U. S.* vol. 1. p. 144,) (1 *Cong. sess.* 2. c. 30,) imposing duties on the tonnage of ships, a duty of *fifty cents per ton* is imposed on all *foreign* ships or vessels; and on ships or vessels of the *United States*, six cents per ton. None but vessels that have been *registered* pursuant to the act for the registry of vessels, (*Laws of U. S.* vol. 2. p. 131,) (2 *Cong. sess.* 2. c. 1,) are deemed vessels of the *United States*; and by the sixth section of the act passed 27th March, 1804, (*Laws of U. S.* vol. 7. p. 152,) (8 *Cong. sess.* 1. c. 57,) a duty of fifty cents per ton, to be denominated *light money*, is laid upon all ships or vessels, not of the *United States*, which, after the 30th of June, 1804, may enter the ports of the *United States*, and which light money is to be deducted, levied and collected in the same manner, and under the same regulations, as the tonnage duties. This vessel being *Spanish* when she came into the port of *New-York*, was liable to pay the *light money*, under the act. None but *American* vessels are exempted.

By the sixtieth section of the act to regulate the collection of duties on imports and tonnage, (*Laws of U. S.* vol. 4. p. 279—377,) (5 *Cong. sess.* 3. c. 128,) provision is made for any ship or vessel, from any foreign port, compelled by distress of weather, or other necessity, to put into any port of the *United States* to which they are not destined; and on complying with the formalities therein required, the cargo, if unladen, may be reloaded, and the vessel may proceed with it to the place of her destination free of any charge, except for the storing and safe keeping of the goods, and the fees to the officers of the customs, as in other cases. By the sixty-third section of the same act, tonnage duties are required to be paid to the collector, at the time of making the entry of the ship or vessel, and no permit to unlade the goods can be given until the tonnage duty is first paid.

We contend that although this vessel entered in distress, and complied with the formalities prescribed by the act; yet as she did not proceed on her voyage, or clear out for her original port of destination, she must be liable to pay *light money*. Though tonnage duty, by the sixty-third section, is required to be paid on the entry of the vessels, yet that regulation is not applicable to vessels entering in distress, who, if they proceed on their voyage again, are not made liable to pay duties. If a vessel, though arriving in distress, breaks up her voyage and enjoys all the advantages of a port of the *United States*, as a place of trade, she ought to pay *the tonnage duty or light money, as other vessels. This is the intention of congress, as fairly to be collected from the act. Though the cargo is brought in under the same circumstances of dis-

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payment is compulsory, and it is not made expressly for the use of the principal. (a)

tress, yet if any of it is sold, it pays a duty. The same reason is applicable to the vessel, if, instead of proceeding on her voyage, she is sold. The exemption is to be confined strictly to the case of coming in in distress, and the prosecution of the voyage afterwards; otherwise, vessels might come in, on the slightest pretext of distress, as the loss of a sail or spar; and finding it convenient to sell vessel and cargo, might break up the voyage, and thus gain every purpose of trade, without a payment of the duties.

2. But if the plaintiffs were not liable to pay the duties for this vessel, yet the defendant having paid over the money to his principal, the government of the *United States*, before any notice not to pay it over, or suit brought, he cannot be made liable, nor can the plaintiffs recover it back. The law on this subject is clear and well settled. (3 *Ld. Raym.* 1210. 4 *Burr.* 1985. 2 *Cowp.* 565. 4 *Term Rep.* 553. *Chitty's Plea.* 25.) And, on this ground, the plaintiffs must fail in their action.

T. A. Emmet, contra. In *Campbell v. Hall*, (*Cowp.* 204,) decided in the court of K. B. in *England*, the money was not paid over to the use of the king, but kept in the hands of the collector, with the privity and consent of the *Attorney-General*, for the express purpose of trying the question as to the validity of imposing the duty. That was a proper and dignified course of proceeding on the part of the government. In the present case, he was sorry to see, for the credit of the government of the *United States*, that a different course had been pursued, and an attempt made to screen their right to this money from investigation, by raising the question as to the paying over the money by the defendant to the use of the *United States*.

1. *Light money*, payable by foreign vessels, is directed to be levied and collected in the same manner as the tonnage duty. Both stand on the same ground. By the sixty-third section of the act for the collection of duties, the tonnage duty must be paid at the time of making entry of the vessel, and before any permit for unlading the goods is granted. The law relative to tonnage applies only to vessels coming in to trade. It is a duty on entry. Vessels forced in by distress are not liable to this duty. After being admitted as a vessel in distress, and having complied with all the formalities of the law, the collector had no right to exact the payment of light money, whether the vessel sailed to her port of destination or not. It is said that fraud and collusion may be practised under the pretence of distress; but the law provides against any imposition, and it is not pretended, in the present case, that the distress was fictitious.

Again, a *sea-lettered* vessel pays only six cents tonnage duty; and the defendant has obliged the plaintiffs to pay fifty cents, as if she was a vessel owned wholly by foreigners.

(a) If money be mispaid to an agent expressly for the use of the principal, and the agent has paid it over, he is not liable to refund. *Hearsey v. Payne*, 7 *Johns. Rep.* 182. *La Farge v. Kneeland*, 7 *Cowen*, 460. *Mowatt v. M^r. Clelan*, 1 *Wendell*, 173. But this rule does not extend to an agent who ob-

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tains money illegally by compulsion or extortion, though no notice is given not to pay it over. *Frye v. Lockwood*, 4 *Cowen*, 454. *Vide Clinton v. Strong*, *infra*, 370.

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Admitting that a vessel entering in distress, and afterwards sold, is liable to pay the duty, still, we contend, the plaintiffs, who purchased the vessel at public auction, are not liable to pay it. The collector must have recourse to the original owners.

By the ninety-third section of the act relative to the collection of duties, a master of a vessel, bound to a foreign port or place, on delivering the manifest of his cargo to the collector, and taking the requisite oath, or affirmation, is entitled to a *clearance*. The act is imperative, and the collector has no right to refuse it. By refusing a clearance in this case, until this *light money* was paid, the payment of it was compulsory on the plaintiffs.

2. The objection that the action does not lie, after the money has been paid over, is *formal*. It does not go to the right and justice of the case. We contend that the action well lies against the defendant, the collector of the customs, in this case. In *Whitebread v. Brookbank*, (*Cowp.* 66. 69. *S. C. Loft*, 529,) the objection was, that an action for money had and received would not lie against an excise officer, for an *over payment*. In *Campbell v. Hall*, the objection was not made. In *Stevenson v. Mortimer*, (*Cowp.* 805,) an action for money had and received was held to lie against a custom-house officer, for an over payment, or excess, of fees. In the case of *Champlin v. Bullman*, (*Parker's Rep.* 198,) which was like the present, an action for money had and received was sustained against the defendant, the collector of the customs of the port of *Bristol*, to recover back money received as a duty on sails belonging to a *French* prize ship, which the court decided the plaintiff was not bound, by law, to pay. In *Greenway v. Hurd*, (*4 Term Rep.* 355,) it was held that the action would not lie against an excise officer, if he had paid the money over to his superior. This objection of the defendant is founded on the cases of *Sadler v. Evans*, (*4 Burr.* 1984,) *Buller v. Harrison*, (*Cowp.* 565,) and *Greenway v. Hurd*. The principles to be deduced from those cases, if attentively examined, are, that this action will not lie, 1. Where the payment is *voluntarily* made to a *known agent*, who is compelled to pay over the *money, and where the principal himself is liable; 2. Where the money is paid by *mistake*, and there is no *notice* of the mistake, or not to pay over; 3. Where money is paid to a *subordinate agent*, who is obliged, under a penalty, to pay it over, and actually does pay it over, to his superior officer. But none of these principles apply to the case of a *compulsory* payment of an illegal demand, and where the officer knows of the illegality.

The defendant is not a subordinate officer. He is to ascertain what duties are payable, and to receive all moneys paid for duties. (*Laws U. S.* vol. 4. 279. 5 *Cong. sess.* 3. c. 128. s. 21.) He is to exercise his judgment and discretion, as to the duties payable. He is obliged to pay over the moneys

received *by virtue of the act*. He is not required to pay over money illegally received, or if the legality of the payment admits of a doubt. No *notice* is necessary in this case. The defendant is bound to know the law, and to declare it. Ignorance of the law in him is criminal. He must understand it at his peril, and act accordingly. If he had doubts, and was told that it was an illegal demand, he ought to have applied to the government for instructions, and demanded an indemnity, before he paid over the money:

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Where the payment is illegal, the right of action is instantaneous and perfect, on the payment of the money; but in case of a mere *mistake*, no action lies until notice is given of the mistake, and a demand made of the money erroneously received. The defendant is the highest and the only officer against whom an action can be brought, and it cannot be in his power, by any *voluntary* act, between him and the government, to defeat the party of his action. If by paying over the money he can avoid all responsibility, he may do so in half an hour after the payment to him. How is the plaintiff to know when it is paid over? Is he to remain ignorant of the fact until the time of trial, and then be surprised and entrapped by this objection?

Baldwin, in reply. The defendant had some ground, at least, in this case, to demand the light money. It was not a clear case; and there was no *mala fides* on his part. In *Chapman v. Bullman*, there was a special verdict, and no objection was made to the act. In *Whitebread v. Brookbank*, Lord *Mansfield* said it would be "a great inconvenience, if an action for money had and received would lie against an officer of the revenue for an over payment."

The true distinction is, that an officer is liable, if he takes money *mala fide*; but not, if he receives it *bona fide*, or by mistake.

* Lord *Mansfield* and Baron *Perrott*, in *Sadler v. Evans*, (4 *Burr.* 1986,) both laid down the principle, that where a payment is made to a known agent, the action ought to be brought against the principal, unless in special cases, as under a *notice* or *mala fide*. *Chitty* (*Chitty on Plead.* 25) states the rule as settled, that if money be paid over before notice to retain it, the agent is not liable, except in the case of an auctioneer or stakeholder. The same principle is recognised by this court, in the case of *Hearsey v. Pruyn*; (7 *Johns. Rep.* 179;) though the court seemed to think that the act of the party in calling on a witness to take notice that the toll was overcharged, was a sufficient notice not to pay the money over. But the *English* decisions do not support the position that such an act or declaration of the party is equivalent to a notice. A suit brought is sufficient notice; but an objection to the legality of the demand is not so. The party may object, but if he afterwards pays the money, the agent has a right

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to conclude that the objection is waived, unless he has some notice to the contrary. In *Greenway v. Hurd*, Buller, J. said, though the plaintiff objected, in June, to pay the money, yet he seemed afterwards to waive the objection.

If the party who pays the money means to resort to the agent to recover it back again, he ought to give such a notice as would justify the agent in retaining the money, and enable him to defend himself against the claim of his principal, or to obtain a bill of interpleader between the parties. The mere objection to the legality of the demand, would not be sufficient to authorize the agent to require an indemnity from his principal, or to defend himself against a suit brought by his principal. Nor is it sufficient to put the agent on his guard, and oblige him to keep the money for six years, until an action is barred by the statute of limitations. There can be no inconvenience, or hardship, in requiring a precise and formal notice to the officer, or agent, of the intention to resort to him, to recover back the money paid. Such a notice would prevent all difficulty. But if a mere objection to the legality of the demand is held to be sufficient, attorneys, and other agents who receive money, may be made responsible, after a lapse of years, when their principals may be dead, insolvent, or removed out of the state.

The defendant is not the superior officer. He acts, with the naval officer, in subordination to the secretary of the treasury. But a superior officer is entitled to more protection, for he cannot sue the government; but an inferior agent may sue his principal.

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*This is an equitable action, and any equitable defence is sufficient to defeat it. The defendant acted *bona fide*, in discharge of his duty. The plaintiffs have acted negligently, in not making the proper inquiry as to the liability of the vessel to pay the duties, and in not giving the defendant notice, in season, not to pay the money over.

It is said that the duties are demandable only on the entry of the vessel; but as this vessel entered in distress, under the special provisions of the act, it could not have been foreseen that she would make herself liable, by breaking up her voyage, to the payment of the duties.

This was a foreign ship at the time of her entry, and the tonnage duty must have reference to her character at that time. All vessels, except those belonging to the *United States*, or registered vessels, pay fifty cents tonnage duty, or light money. The act (8 *Cong. sess.* 2. c. 99) which exempts unregistered ships, owned by citizens of the *United States*, from the operation of the act (8 *Cong. sess.* 1. c. 57) imposing light money, has reference to vessels *bona fide* possessing a *sea-letter*, or regular documents issued from the custom-house, proving the property *American*, and entering from some foreign port or place, as *sea-letter* vessels.

Again, it is said that the plaintiffs, who have purchased this vessel at public auction, ought not to pay this duty. But they are the owners of the vessel; and the duty may be considered as a *lien* on the ship. How could a suit be maintained against the original owner? The collector may detain the ship's papers until the duties are paid; and why may he not detain the ship, or refuse a clearance, in such case?

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Per Curiam. The principal question here is, whether the defendant was authorized to demand the money which he exacted of the plaintiffs, as the tonnage or light money of the ship they had purchased. The ship arrived in the port of *New-York* in distress, and was entered in *September*, 1809, and being condemned and sold by the wardens of the port, the sum in question was exacted, on the clearance of the ship, on another voyage, in *May*, 1810.

The law (*Laws of U. S.* vol. 4. 384) requires tonnage to be paid at the time of entry, and no permit to unlade is to be granted *until the duty is paid. This is the general rule on the subject; and light money on the entry of foreign vessels, is to be levied in the same manner as tonnage. (*Laws of U. S.* vol. 7. 157.) But there is a special provision for the case of vessels arriving in distress. They are to be unloaded free of duty when there is a necessity for it, and when the goods are reladen, the ship may proceed "to the place of her destination," free of any other charge than what relates to the storage of the goods, &c. (*Laws of U. S.* vol. 4. 377.) The statute does not provide especially for the case in which the ship so arriving in distress is necessarily condemned and sold, and the voyage broken up; but the reason of the exemption seems to apply. The permit to unload the goods from the ship, without exacting the tonnage, is an admission of the exception. If tonnage be not due when the ship so arriving in distress is repaired, and enabled to renew her voyage, it would be inconsistent and unjust to demand it, when she was so disabled as to be incapable of repair, or of renewing the voyage. This would be to waive the duty in the case of a moderate, and require it in case of an extreme calamity to the ship. When the plaintiffs purchased the ship, they did not purchase her with this tonnage duty as a *lien* attached to her. Suppose her very wreck had been purchased, and a new ship had been built on the same keel and with the same name, would any person have thought of the tonnage duty? The very entry of the ship in distress and landing of the goods, seems to have put an end to the tonnage duty, provided there was no collusion or bad faith in the transaction, and the voyage was interrupted, or finally broken up, from the necessity of the case.

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The tonnage or light money in question was, at any rate, wrongfully demanded of the plaintiffs as a condition of the clearance, and that being established, they are entitled to recover it back in this action, without showing any notice to the

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defendant not to pay the money into the public treasury. The cases which exempt the agent from the suit, if he has, in the mean time, paid over the money to his principal, without notice, do not apply. Here is no person but the defendant, against whom the suit could, in any event, be brought, and the money was paid by compulsion. It was extorted as a condition of granting the clearance, and not paid with the intent or purpose that the collector should pass it to the credit of the *United States*. The case of *Snowdon v. Davis*, (1 *Taun.* *359,) lays down this just distinction, that notice to the agent is not requisite, in the case of a compulsory payment, and one not made expressly for the use of the principal. The plaintiffs are, accordingly, entitled to judgment.

Judgment for the plaintiffs.

DETOUCHES against PECK.

A., the master of a vessel, called the *Urania*, lying at Amsterdam, for 1,750 guilders, paid by B. in advance, contracted for his passage and board in the said vessel, from Amsterdam to Batavia. The vessel put into New-York in distress, and the owner repaired and sent her on a different voyage, to Naples; but offered B. a passage in another vessel, which was ready to sail from New-York to Batavia, and was a larger and more commodious ship; B., though he did not accept the offer, did not object to the change of the vessel, but said he had business to transact in Philadelphia, and could not

THIS was an action on the case, brought to recover back the *passage-money*, paid by the plaintiff to the defendant, for a passage in the schooner *Urania*, owned by Messrs. *Minturn & Champlin*, from Amsterdam to Batavia.

The cause was tried before Mr. Justice *Thompson*, at the *New-York* sittings, in May, 1811.

The following receipt was produced on the part of the plaintiff. "Received of P. G. *Detouches*, the sum of 1,750 guilders, for passage and boarding on board of my vessel, the *Urania*, on her present voyage to Batavia, for which I engage myself to afford him my table, and every other accommodation, (liquors excepted.) Amsterdam, 3d October, 1809. *John M. Peck*."

The *Urania*, after leaving Amsterdam, for Batavia, put into New-York in distress, where she arrived the 6th December, 1809. She did not proceed to Batavia, but was, afterwards, sent on a voyage from New-York to Naples, for which place she cleared out the 21st December, 1809.

On the arrival of the *Urania* at New-York, *Minturn & Champlin* had another vessel, a large and very fine ship, called the *Thames*, nearly ready to sail for Batavia; and told the plaintiff, and the other passengers, that they should proceed in her to Batavia. All the other passengers, except the plaintiff, gladly accepted the proposal, as the *Thames* was a large and commodious ship, and in every respect preferable to the *Urania*, which was a small schooner, with very indifferent accommodations. The plaintiff made no objection to the change, but informed *Champlin*, one of the owners, through the witness, who acted as interpreter, *that he had business of importance to transact at Philadelphia, and should not be able to proceed immediately to Batavia. It appeared that the

plaintiff was indisposed from the time of his arrival at *New-York*, until after the sailing of the *Thames* for *Batavia*.

A verdict was taken for the plaintiff, by consent, for seven hundred and sixty dollars, subject to the opinion of the court, on the above case.

T. A. Emmet, for the plaintiff, admitted that no similar case was to be found in the books. He said that the plaintiff did not demand a return of the whole passage-money, but was willing to allow a *pro rata* freight for his passage to *New-York*. In that view, it might be likened to the case of goods accepted by the owner or consignee, at an intermediate port. But he contended that a passenger, a reasonable and intelligent being, was not to be treated as a bale of merchandise, and transferred from one ship to another, as it might suit the convenience or pleasure of the captain, or his owners.

The plaintiff had a judgment to exercise, and a choice to make, as to the particular vessel in which he was to be carried. Having made his election, and the defendant having engaged to carry him in a particular ship, he ought not to be obliged, unless in a case of necessity, to proceed in another. It may be, he was better pleased with the *Urania*, and liked his accommodations in that vessel. He might also prefer the master, and have greater confidence in his skill as a navigator.

Again, this may be considered as a contract rescinded by mutual consent, and the plaintiff, therefore, entitled to have his money back.

Bristed and *Robinson*, contra, contended, that it was owing to the plaintiff's own act that he was not carried to *Batavia*, as the *Urania* put into *New-York* from necessity, and the defendant offered to provide, and did actually provide, another and a better ship. They admitted that no case in point was to be found; but on principles, they thought it a clear case for the defendant. The defendant must have expended some part of the money he received, in providing diet and accommodation for the plaintiff: and ought, therefore, to retain to that amount, at least, besides, for the transportation *pro rata*, if that could be ascertained. (10 *East*, 468.)

**Per Curiam.* The plaintiff is not entitled to recover; for it was his own act that the voyage was not performed by him. The schooner *Urania* deviated from her direct course, and entered the port of *New-York*, from necessity, and as the plaintiff had a better ship provided for his voyage, and made no objection to the change, but was prevented from sailing by his own private business or indisposition, he has no right to call for a return of the freight money, or any part of it. The providing of provisions and accommodations for his passage entered essentially into the consideration for the advance, and part of the voyage was performed. It would be difficult to find a just rule by which to liquidate a *pro rata* freight in such

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action brought by *B.*, to recover back the passage money he had paid, it was held, he was not entitled to recover any part of it, as it was by his own act that he did not pursue the voyage, and the vessel in which he set sail deviated from her direct course from necessity; and the providing of diet and accommodations for his passage, entering especially into the consideration of the advance for the voyage, part of which had actually been performed

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cases, (a) but there is no reason, in this case, for giving the plaintiff the return of any part of the freight.

Judgment for the defendant.

(a) See in a note to *Ingersoll's* translation of *Roccus*, (p. 70,) the following case decided in the Supreme Court of *Pennsylvania*. It is stated from the relation of one of the counsel in the cause. *Maureau* was master of a French vessel bound from *Philadelphia* to *Bordeaux*, on board of which *Germain* took his passage, and paid his passage-money in advance. Two days after her sailing, the vessel was wrecked and totally lost in *Delaware Bay*. In an action brought by *G.* against *M.*, the court ruled that the plaintiff was entitled to recover back the whole of the money he had advanced, deducting a reasonable compensation *pro rata itinere*, for the two days the plaintiff had been on board. See *Roccus*, n. 80, 3 *Johns. Rep.* 34.

CRANSTON AND ANOTHER against THE EXECUTORS OF KENNY.

Where a cause is submitted to arbitration, without a rule of court; this court will not interfere to set aside the award; nor if made a rule of court, will the award be set aside unless for corruption or misconduct. (a)

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ANTHON, for the defendants, moved to set aside the award of the arbitrators in this case, which had been submitted to arbitration; but without any rule or order of the court. He stated the ground of the application to be, that the arbitrators had mistaken the law; and he contended that this court had a right to interfere and set aside the award in such a case. He cited 2 *Vesey*, 18. 2 *Bos. & Bull.* 375. 2 *Vern.* 705. *Burr.* 1257. 3 *East*, 13. *Lawrence, J. Barlow v. Todd*, 3 *Johns. Rep.* 367. *Newland v. Douglas*, 2 *Johns. Rep.* 62.

Slosson and Garr, contra, insisted that this court had no power to interfere and set aside an award, unless for the misconduct, or corruption, of the arbitrators. They cited *Tidd*, 762. 3 *Atk.* *529. 3 *Burr.* 1258. *Newland v. Douglas*, 2 *Johns. Rep.* 62. *Barlow v. Todd*, 3 *Johns. Rep.* 367. 2 *Wils.* 148. 1 *Johns. Rep.* 315. 492.

SPENCER, J. delivered the opinion of the court. This case was submitted to arbitrators, by the parties, without any rule or order of the court, and their award is now attempted to be set aside, on the ground that the arbitrators have decided contrary to law.

This application struck me, as singular, but the defendants' counsel insisted that the cases he cited bore out the application. I have examined all of them, and they are inapplicable to this case.

In the case of *Newland v. Douglas*, (2 *Johns. Rep.* 62,) this court decided that proof of a mistake of arbitrators was inadmissible at law, and that the Court of Chancery alone could correct a palpable mistake of arbitrators; and in *Barlow v. Todd*, (3 *Johns. Rep.* 367,) we held that the awards of arbitrators are not examinable in a court of law, unless the condition is to be made a rule of court, and then only for corruption, or gross partiality. Under the statute, (a) and where the submission is agreed to be made a rule of court, power is given

(a) 2 R. S. 542, s. 10.

(a) Acc. *Jackson v. Ambler*, 14 *Johns. Rep.* 96. *M'Kinney v. Newcomb*, 5 *Cowen*, 425. *Mitchell v. Bush*, 7 *Cowen*, 185. *Efner v. Shaw*, 2 *Wendell*, 567. *Elmendorf v. Harris*, 5 *Wendell*, 516. And see *Peters v. Newkirk*, 6 *Cowen*, 103. *Gould v. Banks*, cited in 5 *Wendell*, 521, and in the note to p. 522 of the same volume. *Ex parte, Bassett*, 2 *Cowen*, 458.

to the courts of common law jurisdiction, to set aside any arbitration, or umpirage, procured by corruption or undue means; and this is the limit of the authority of those courts. To justify, or authorize an interference, there must be corruption, or undue means used, in procuring the award.

If there has been a plain mistake committed by the arbitrators, the relief lies only in equity. (3 *Atk.* 494. 694.)

The cases cited by the defendants' counsel, are those where applications have been made to set aside the report or award of an arbitrator, appointed under a special rule in such case. They do not, therefore, touch the point raised in this cause; but even in such case, the Court of King's Bench refused to interfere, unless the award was so notoriously against justice, and his duty, as an arbitrator, that misconduct in the arbitrator could be inferred. (13 *East*, 357.)

Motion denied.

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*STEELE against SOUTHWICK.

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THIS was an action for a *libel*. The first count stated that the plaintiff was sworn, and examined as a witness, in a cause tried at the circuit, in *Albany*, in which this defendant was plaintiff, and *Harry Croswell* defendant; that the plaintiff is a bookseller and stationer, in *Albany*, and has for a sign, a book lettered "*Bible*;" and that the defendant, maliciously intending, &c. on the 5th *December*, 1809, printed, &c. in "*The Albany Register*," a certain false, &c. libel, of and concerning the plaintiff, &c. as follows: "Affidavits. Our army swore terribly in *Flanders*, said Uncle *Toby*; and if *Toby* was here now, he might say the same of some modern swearers. The man at the sign of the bible (meaning the plaintiff) is no slouch at swearing to an old story," (meaning, &c.)

A. was a witness in a cause between *B.* and *C.*, and *C.* afterwards printed and published the following words of *A.* "Our army swore terribly in *Flanders*, said Uncle *Toby*; and if *Toby* was here now, he might say the same of some modern swearers. The man (meaning *A.*) is no slouch at swearing to an old story."

The second count stated, that the plaintiff was examined as a witness in a cause between the defendant and *Croswell*, and testified truly, &c.; that the defendant had told him, the plaintiff, that he, the defendant, approved of *Fox's* maxim, to wit, "That the public was a goose, and that he was a fool who did not pluck a quill when he had an opportunity." Yet the defendant, intending, &c. to cause it to be believed that the plaintiff, in giving the evidence aforesaid, was guilty of perjury, did, on the 9th day of *January*, 1810, publish, &c. a certain other libel in "*The Albany Register*," as follows, to wit, "As complete evidence of his candor, (meaning his honor Mr. Justice *Spencer*, before whom the cause was tried,) in the present case, for error there was none, I (the defendant) need only mention, that he told the jury, emphatically, that it was proved by *Steele*, that I had declared to him, that I approved of *Fox's* maxim, that the public was a goose, &c.; that this was a very

In an action brought by *A.* for a libel, it was held that these words, if they did not import a charge of perjury in the legal sense, yet they were libellous, as they held up the plaintiff to contempt and ridicule, as being so thoughtless or so criminal as to be regardless of the obligations of a witness, and

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therefore, as
utterly unwor-
thy of credit.

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Where C. published a direct and positive contradiction of what a witness at a trial between B. and C. had sworn that A. had said; this was held not to be a libel, as it was not accompanied with any imputation of a crime in A.

profligate sentiment, and that if they believed the testimony of *Steele*, they could not, in estimating damages, conceive any thing due to the feelings of a man capable of entertaining it, for that such feelings could not be injured; but while I acknowledge the correctness of this decision, and most sincerely and heartily concur in it, I am bound to declare, which I now do most solemnly, in the presence of an all-seeing God, my *firm conviction, that I never made to *Steele* the declaration above-stated. It is utterly impossible, from the barefaced absurdity, as well as from the abandoned profligacy, manifested by such a declaration, that I ever could have made it; and how that man's (the plaintiff's) imagination has wrought itself into a belief that I made it, is to me truly a subject of wonder, as it is of regret, that I find myself constrained, by what is due to my own honor, thus publicly and solemnly to deny what he has solemnly and publicly sworn to." By means whereof, &c.

There was a general demurrer to the whole bill, and a joiner in demurrer. The cause was submitted to the court, without argument.

Per Curiam. The plaintiff, in the first count, avers, that he had been called to testify, as a witness, in behalf of *Harry Croswell*, in a suit brought by the present defendant against the said *Croswell*, and that the defendant, afterwards, and with a view to injure the character and credit of the plaintiff, maliciously published the words stated in that count, in which the plaintiff is represented, as swearing "terribly," and as being "no slouch at swearing to an old story." These words import that he swore with levity, and rashly, and inconsiderately, without due regard to the solemnity of the oath, or to the truth and accuracy of what he said.

If the words do not import perjury in the legal sense, they hold the plaintiff up to contempt and ridicule, as being so thoughtless, or so immoral, as to be regardless of the obligations becoming a witness, and, therefore, to be utterly unworthy of credit. In this view, the words are actionable, for a writing published maliciously, with a view to expose a person to contempt and ridicule, is undoubtedly actionable; and what was said to this effect, by the judges of the C. B. in *Villers v. Mensley*, (*Wils.* 403,) is founded in law, justice, and sound policy. The opinion of the court, in the case of *Riggs v. Denniston*, (*3 Johns. Cas.* 205,) was to the same effect: and the definition of a libel, as given by Mr. *Hamilton*, in the case of *The People v. Croswell*, (*3 Johns. Cas.* 354,) is drawn with the utmost precision. It is a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals. (a) To allow the press to be the vehicle of malicious ridicule of private character, would soon deprave the moral taste of the community, *and render the state of society miserable and barbarous. It is true, that such publications are also in-

(a) Vide *Ham. v. King*, 7 Cowen, 613.

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dictable, as leading to a breach of the peace; but the civil remedy is equally fit and appropriate, and as the jury assess the damages, it is, in most cases, the more desirable remedy, and one which gives most satisfaction.

The second count does not appear to contain actionable matter.

The defendant confines himself to a denial of the charge, and a vindication of himself, and as that denial is not accompanied with any imputation of a crime to the plaintiff, or any thing like malicious or wanton ridicule of him, it does not appear to be any thing more than a lawful vindication. But as the demurrer is to the whole bill, the plaintiff is entitled to judgment.

Judgment for the plaintiff.

SCOTT *against* VAN ALSTYNE.

THIS was an action of *assumpsit*. The suit was commenced by *bill* against the defendant, as one of the attorneys of the court, in the usual form. The defendant pleaded that at the time of filing the bill against him, he was not one of the attorneys of the court, acting or practising as such, and is not an acting or practising attorney of the court, but had, for more than three years preceding the filing of the bill of the plaintiff, pursued the business of a *farmer*, and had not, during all that time, attended the court as an attorney, or practised as such, and was not bound by custom to answer to a bill filed against him as an attorney, &c.

There was a *general demurrer* to the plea, which was submitted to the court, without argument.

Per Curiam. An attorney, being defendant, cannot, by plea, waive or destroy his privilege, because the privilege is allowed him, not for his own sake, but for the sake of the court, and the suitors in it. If he renounces his privilege by mere absence from court, and business, how is the plaintiff to know that fact beforehand? He can only judge from the record, and it is sufficient for him that the defendant is an attorney, *prout patet per recordum*. This is the amount of the doctrine in the adjudged cases. (*Gardner v. Jessop*, 2 Wils. 42. *Farrill v. Head, Barnes*, 41.) If the defendant *wishes to withdraw himself from the privilege, or as he may choose to consider it, the burden of his office and distinction as an attorney, he must apply to have his name struck off the roll. This he may do at any time, and the court will always grant that leave, unless the application be made to withdraw himself from some impending censure, and then, as Lord *Eldon* has lately observed, (6 *Vezey*, 4,) the court will refuse to do it.

Judgment for the plaintiff.

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An attorney, defendant, cannot waive his privilege, for it is not allowed for his own sake, but for the sake of the court, and the suitors in it. It is sufficient for the plaintiff, who proceeds *by bill*, that the defendant is an attorney of record, and if the attorney wishes to get rid of the privilege, he must apply to the court, who will strike his name off the roll, unless the application is made to avoid an impending censure of the court.

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GOSHEN
TURNPIKE CO.
v.
HURTIN.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE
GOSHEN AND MINISINK TURNPIKE ROAD *against*
HURTIN.

A note by which A. promised to pay the president, directors and company of a turnpike road, 125 dollars, for five shares of the capital stock of the corporation, in such manner and proportion and at such time and place, as the president, directors and company should require, is a good promissory note within the statute, and may be declared on as such. Every note within the statute, imports a consideration, unless the contrary ap-

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pears in the note itself.

An action lies against a stockholder of a turnpike corporation, at the suit of the corporation, on his promise in writing, to pay for the shares for which he has subscribed, in instalments; notwithstanding the remedy given in the act, to exact, in case of non-payment, a forfeiture of the shares, and all previous payments. (a)

(a) Vide *Highland Turnpike Co. v. McKean*, 11 Johns. Rep. 98. *Dutchess Cotton Manufactory v. Davis*, 14 Johns. Rep. 238.

THIS was an action of *assumpsit*, on a promissory note made by the defendant, dated the 1st of May, 1800, by which he "promised to pay to the plaintiffs one hundred twenty-five dollars, for five shares of the capital stock of the said corporation, in such manner and proportion, and at such time and place, as the said plaintiffs should, from time to time, require." There was a general demurrer to the declaration, and joinder in demurrer. The cause was submitted to the court, without argument.

Per Curiam. The note set forth in the declaration is a good promissory note within the statute, though it has not the words "*bearer, or order*," and may be declared upon as such. This is the established *English* law, (6 *Term Rep.* 123. 2 *Lord Raym.* 1545,) and the same rule was recognised, by this court, in the case of *Downing v. Backenstoës*; (3 *Caines' Rep.* 137,) for our statute relative to promissory notes, is the same, in substance, as the statute of 3 and 4 *Anne*. The note was payable in money, and payable absolutely, and not depending on any contingency. It was, in effect, payable on demand, and it was not requisite that a consideration should be averred, or appear upon the face of the note, for every note within the statute, unless there be something *in the note itself to the contrary, imports a consideration; and that presumption stands good until the defendant destroys it. There is, however, a consideration appearing on the face of the note in this case, for the promise to pay the one hundred and twenty-five dollars, was "for five shares of the capital stock of the corporation;" and it is to be intended that the defendant had duly become a stockholder to that amount.

But the question which the parties undoubtedly had principally in view, in this case, is, whether an action will lie at all on a promise by a turnpike stockholder to pay his instalments; and whether the remedy given to the company by the statute, to exact the penalty of a forfeiture of the shares, and of all previous payments, be not the only remedy. The decision of the Court of Errors, by which the decision of this court, in the case of *The Union Turnpike Company v. Jenkins*, (1 *Caines' Rep.* 381,) was reversed, may have given countenance to that opinion, but we apprehend that upon a careful examination of that case, the reversal is to be placed on other grounds, and that the reasoning and decision of the court, upon the principal point, remains good. In that case, the condition upon which *Jenkins* was to become a member of the company, viz. paying ten dollars, had not been performed, and the corpora-

tion was understood not to have been *in esse*, at the time of the making of the promise by *Jenkins*. It is to be presumed that the judgment of reversal went upon that ground; and that was the ground taken by the Chancellor, who was then the principal law member of that court. We are the more confirmed in this view of that case, as actions upon such promises are sustained in the courts in *Massachusetts* and *Pennsylvania*, and upon principles which we deem conclusive. (5 *Tyng*, 80 2 *Hall's Law Journal*, 231. 1 *Binney*, 70.)

Judgment for the plaintiffs.

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v.
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*GILPIN, *qui tam*, &c. against VINCENT.

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IN error, from the *Mayor's Court of New-York*. The plaintiff brought an action of debt against *Vincent*, in the court below, to recover the penalty of two hundred and fifty dollars, for selling as a slave, a certain black woman, brought into the state, after the 1st *April*, 1810, &c.

The act concerning slaves (*sess.* 24, c. 188, s. 5,) (a) gives one half of the penalty to the person suing for it, and the other half to the treasurer of the state.

At the trial of the cause, *George Ferguson* was offered as a witness on the part of the plaintiff, who, being a member of the *New-York* society for promoting the manumission of slaves, and protecting such of them as have been, or may be liberated, was objected to, and being affirmed on his *voir dire*, he declared that he had no interest in the event of the cause, and should not be a gainer or loser thereby; that there was no agreement or understanding, that he should be in any manner responsible for any part of the costs, whatever might be the event of the suit; and that he was no way bound to contribute to the costs. The plaintiff and witness, as well as the plaintiff's attorney, were members of that society; and it was the practice of the society to indemnify one another against the costs of suits of this nature, in case of failure. It was also the practice of the members, by voluntary contributions, to reimburse money which any of them had laid out in regard to slaves. The witness had expended considerable sums, in that way, himself, and expected, if the society were in funds, they would repay him; but he had no legal demand on them for any repayment. That he believed that the proceeds of the suit, in case the plaintiff recovered, would be given by him to the society. The witness being asked whether he would or would not contribute to the costs of the suit, in case the plaintiff failed, answered that he would not say that he would not contribute; that if the plaintiff, in such case, should ask him, he thought he should give something, as he usually did in such cases, although he was no way bound to do it; but should be

In a *qui tam* action to recover a penalty given by the act concerning slaves, a member of the *New-York* society for the manumission of slaves &c. is a competent witness, he being under no legal obligation to contribute to the expenses of the suit, and having no interest in the event of it; and though the witness, on his *voir dire*, said that if the plaintiff should fail, he thought he should, as a member of the society, if asked, give something towards compensating the plaintiff, as he usually did in such cases, but he was no way bound to do so, and should be governed only by his general practice and principle. (a)

(a) Vide *Stockham v. Jones*, 10 *Johns. Rep.* 21. *Griswold v. Sedgwick*, 1 *Wendell*, 126. *Moore v. Hitchcock*, 4 *Wendell*, 282. *Ten Eyck v. Bill*, 5 *Wendell*, 55. *Owings v. Speed*, 5 *Wheat.* 420

(a) Vide 1 *R.* 2. 658, s. 8.

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governed merely by his general practice and principle. The plaintiff then offered, on the part of the society, to release any interest or responsibility of the witness, in relation to the cause. The court rejected the witness as incompetent, *and ordered the plaintiff to be called, and nonsuited, and a judgment of nonsuit was, thereupon, entered against him.

A bill of exceptions was taken to the opinion of the court. On the return to the writ of error,

The cause was submitted to this court, without argument.

Per Curiam. The question arising upon this record is, whether *George Ferguson* was a competent witness for the plaintiff below. He was under no legal obligation to contribute to the expenses of the suit, and had no interest in the event. It depended upon the pleasure of the plaintiff, whether or not he would give the amount of the recovery in the suit, or any part of it, to the society, of which the witness was a member, and if it had been certain, yet, as the society was a mere charitable institution, in which the witness had no personal interest or responsibility, his being a member would not disqualify him. (*Weller v. Governor of the Foundling Hospital, Peake's N. P. Cases*, 153.) But the witness said "that if the plaintiff failed, and should ask him, he thought he should give something, as he usually did in such cases, although he was in no way bound to do it, but should be governed merely by his general practice and principle." This declaration did not show that he had any interest that disqualified him. There was no fixed, or certain, or legal interest. It depended entirely upon his volition, and upon the contingency of his being asked by the plaintiff, and upon his sense of his general practice and principle. An interest depending upon such circumstances, was altogether vague and uncertain, and did not amount even to an ideal or honorary obligation to pay; and it has been ruled, that even such an obligation does not go to the competency of the witness. The judgment below must be reversed.

Judgment reversed.

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*BOWNE AND SEYMOUR *against* JOY.

The pending of a suit in another state, or a foreign court, by the same plaintiff against the same defendant, for the same cause of action, is no stay or bar to a new suit brought here; the ex-

This was an action of *assumpsit*. The defendant pleaded another action brought by the plaintiffs against the defendant, for the same cause, in the Court of *Common Pleas* of the county of *Bristol*, in the state of *Massachusetts*, and there pending in that court, &c.

The plaintiffs demurred to this plea, and assigned causes of demurrer.

The cause was submitted to the court, without argument.

Per Curiam. It is not necessary to attend to the special

causes of demurrer, because the plea is bad in substance. The pendency of a suit in a *foreign* court, by the same plaintiff against the same defendant, for the same cause of action, is no stay or bar to a new suit instituted here. This is the rule in the *English* courts, and it was carried so far in the case of *Maule v. Murray*, (7 Term Rep. 470,) as not to regard a foreign judgment which was taken subject to a case then undecided, as to the amount. The *exceptio rei judicatæ* applies only to final definitive sentences abroad, upon the merits of the case. (1 Johns. Cases, 345.) Nor is this analogous to the case of the pendency of a prior foreign attachment, at the suit of a third person, for here the defendant would not be obliged to pay the money twice, since payment at least, if not a recovery in the one suit, might be pleaded *puis darrein continuance* to the other suit; and if the two suits should even proceed, *pari passu*, to judgment and execution, a satisfaction of either judgment might be shown upon *audita querela*, or otherwise, in discharge of the other. According to the doctrine in *Sperry's case*, (5 Co. 61,) this plea would not be good even in the Supreme Court of *Massachusetts*, because it is a plea of a suit pending in an inferior court.

Judgment of *respondeas ouster*.

(a) Acc. *Walsh v. Durkin*, 12 Johns. Rep. 99. The pendency of another suit in the same state for the same cause of action cannot be pleaded in abatement, unless both were commenced at the same time. *Haight v. Holley*, 3 Wendell, 262. Exemplifications of proceedings in another court between the same parties and for the same cause of action, cannot be given in evidence under the general issue. *Percival v. Hickey*, 18 Johns. Rep. 257. But the pendency of proceedings under a foreign attachment in another state may be pleaded in abatement. *Embree v. Hanna*, 5 Johns. Rep. 101. Vide *Wheeler v. Raymond*, 8 Cowen, 311, note (a.)

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ceptio rei judicatæ applies only to final or definitive sentences abroad, upon the merits of the case. (a)

*JACKSON, *ex dem.* JEREMIAH WELLS, against DANIEL WELLS.

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THIS was an action of ejectment, for lands in *Suffolk* county. The cause was tried at the *Suffolk* circuit, in *July*, 1810, before Mr. Justice *Yates*.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the following facts, with liberty to either party to turn the same into a special verdict; and also to put into the form of a bill or bills of exceptions, to be returned on the *postea*, all or any part of the testimony objected to by either party, and admitted by the judge, &c.

On the part of the plaintiff, the will of *Daniel Wells* the elder, who was father of the lessor of the plaintiff, and grandfather of the defendant, was read. It was dated the 25th *March*, 1761. The parts of it which it is material to state here, are as follows: "As to such worldly estate it has pleased God to confer upon me, I give and bequeath as follows, after my just debts are paid, and funeral expenses satisfied by my executors after named: *Imprimis*, I give and bequeath unto my eldest son, *Daniel Wells*, all that part of a lot of land I now

Where *A.* being seized in fee of lands, devised to *D.* among other things, as follows: "I give and bequeath unto my eldest son, *Daniel*, all that part of a lot of land that I now live on, northward," &c. and after devises and legacies to other sons, and his daughters, devised to his third son, as follows: "I give and bequeath unto my third son, *Jeremiah*, and to his

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heirs and assigns, for ever, all the rest of my estate, both moveable and immoveable, of every kind, not disposed of," &c. "he paying all my just debts, and the said legacies, &c., and if he should refuse or neglect to pay all my just

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debts, &c. then my will is, that my executors sell so much of that part of my estate given to him, as shall pay," &c.

It was held, that *Daniel* took only a life estate in the lot devised to him; and that *Jeremiah*, under the devise to him of the residue of the testator's estate, took the remainder in fee, after the determination of such life estate.

(a)

(a) A devise of land without words of perpetuity, and where there is nothing in the will from which a fee can be raised by implication, vests only a life estate in the devisee. *Jackson v. Embler*, 14 Johns. Rep. 198. *Wright v. Duer*, 10 Wheat. 204.

live on, northward of the north road, and also three lots on the broad meadow, and also a convenient way through my said lot, to the south road, &c. And also one half of all my common. *Item*. I give and bequeath unto my second son, *Mica Wells*, and to his heirs and assigns for ever, a two pole way from the land of my said son," &c.

Then follow devises to his *fourth, fifth and sixth* sons, and their heirs and assigns for ever, and legacies to his daughters; then the following clause: "*Item*. I give and bequeath unto my third son, *Jeremiah Wells*, and to his heirs and assigns for ever, all the rest of my estate, both moveable and immoveable, of every kind not disposed of, to him, my said son, *Jeremiah Wells*, and to his heirs and assigns for ever, he paying all my just debts, and the above said legacies, &c.; but if my said son refuse or neglect to pay all my just debts, and the above legacies, then my will is, that my executors shall sell so much of that part of my estate, *which I gave to him, as shall pay all my just debts, and the above legacies. Lastly, I do nominate, &c. my two sons, namely, *Daniel Wells* and *Jeremiah Wells* to be my only executors," &c.

The testator died the 2d *April*, 1761. The lands in question were those described in the first clause in the will, as devised to his eldest son *Daniel*, and of which the testator at the time of his death was seised in fee-simple. *Daniel*, the eldest son of the testator, on the death of his father, took possession of the lands so devised to him, and died in possession, on the 18th *August*, 1793. *Jeremiah Wells*, the lessor, is the person called by the testator in his will, his *third son*. *Jeremiah*.

Daniel Wells, the eldest son of the testator, held the premises during his life-time, considering himself as the owner thereof, in fee-simple, and devised the same to his eldest son *Daniel*, the present defendant, who, on the death of his father, in 1793, entered into possession under that devise, and has ever since held the possession, as owner thereof, in fee-simple. The children mentioned by the testator, in his said will, were living at the time of his death.

Baldwin, for the plaintiff.

Riker, contra.

Per Curiam. Upon this will it is clear, upon the established principles of construction, that the defendant's father took only an estate for life. The words of the will are, "I give and bequeath unto my eldest son, *Daniel Wells*, all that part of a lot of land that I now live on." Here are no words of limitation or perpetuity, though it appears, from other parts of the will, that the testator understood their force and effect, and knew how to use them; nor is there a single word, or expression, which denotes any thing more than a description of the land devised. There is nothing which alludes to the quantity of interest which the testator had in the land. It is

a mere designation of its local situation, and to give this devise the effect of a fee would upset a volume of adjudged cases, and throw the law of devises into inextricable confusion and uncertainty. The cases of *Denn v. Gaskin*, (Cowp. 657,) *Right v. Sidebotham*, (Doug. 759,) *Doe v. Wright*, (8 Term Rep. 64,) and *Doe v. Child & Wife*, (4 Bos. & Pull. 335,) *may be cited out of an almost endless series of authorities, as very much in point, and perfectly decisive.

2. The next question is, whether the remainder of the testator's interest in the premises, after the termination of the life estate, was not devised to the lessor of the plaintiff. He gives to the lessor, in fee, "All the rest of his estate, both moveable and immoveable, of every kind not disposed of," and then charges it with some debts and legacies, and in default of his paying the same, the testator directs that so much of the estate so devised to him, should be sold, as should be requisite to pay the debts and legacies. This point is as clear as the other. *All the rest of his estate, not disposed of*, is a general sweeping clause, that must most obviously embrace the interest in question. After this clause, there could be no dying intestate as to any part of the estate. The authority to the executors to sell any part of his estate on non-payment of the debts and legacies, cannot be considered as a restraint or qualification of the residuary clause, so as to detach the interest in question from it; for an interest in remainder is capable of being sold no less than a vested interest.

The plaintiff is, accordingly, entitled to judgment.

Judgment for the plaintiff.

DUNHAM against CHAMBERLAIN.

THIS was an action of *assumpsit*, brought in the Common Pleas of *Delaware*.

The action arose on matters of account between the parties. The cause, by rule of court, was referred to referees, who allowed to the plaintiff the amount of one hundred and forty-one dollars of his account, and to the defendant one hundred and twenty-four dollars and twenty-six cents, leaving a balance of fifteen dollars and seventy-four cents, for which the plaintiff obtained judgment. The referees, in their report, certified that the account of the plaintiff, as proved, amounted to one hundred and forty-one dollars, and the account of the defendant, as proved, to one hundred and twenty-four dollars and twenty-six cents, the whole amounting, together, to two hundred and sixty-five dollars and twenty-six cents.

Each party claimed costs, and it was submitted to the court, on *a case, containing the above facts, which of them was entitled to the costs.

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An action was brought in a court of *common pleas*, founded on matters of account between the parties, which was referred by order of the court, and the referees in their report certified, that the amount of the respective accounts of the parties proved before them, taken together, was 265 dollars and 26 cents, and that the balance of 16 dol

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lars and 74 cents was due to the plaintiff, for which sum he obtained judgment; and it was held that the plaintiff was entitled to costs.

(b) Vide *Abernathy v. Abernathy*, 2 *Cotter*, 413.

Per Curiam. A justice's court has no jurisdiction of matters of account, "where the sum total of the accounts of both parties shall, in the whole, amount to two hundred dollars." Here the accounts of both parties proved to the satisfaction of the referees, exceeded, in the whole, two hundred dollars. It was, therefore, clearly a case in which a justice had no jurisdiction, and the plaintiff was obliged to sue in the Common Pleas. And in all suits in the Common Pleas, where "the accounts between the parties exceed two hundred dollars, to be certified, &c. if by reason of payment, or discount, the plaintiff shall recover less than twenty-five dollars, he shall recover costs," &c. (*Laws N. Y.* v. 1. p. 530.) (a) The certificate of the referees was, here, a substitute for the certificate of the judge, upon the trial, and the plaintiff is entitled to costs.

Judgment for the plaintiff.

(a) 2 *R. S.* 614, sec. 9, 10, 11.

HOPKINS AND MUDGE, EXECUTORS OF HOPKINS, against FLEET AND YOUNG, OVERSEERS OF THE POOR, &c.

Where the overseers of the poor of the town of O. gave a certificate in writing "that the bearer J. the slave of H. was under the age of 50 years and of sufficient ability to get his living," at the bottom of which was written, "We do hereby manumit the

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same," and the whole signed by the overseers, but not by the executors of H. to whom the slave belonged; and the certificate was recorded in the office of the clerk of the town, it was held that this certificate, registered at the request of H., was conclusive

IN error, from the Court of Common Pleas of *Queen's* county. *Fleet* and *Young*, the defendants in error, as overseers of the poor of the town of *Oysterbay*, brought an action against the plaintiffs in error, as executors of *Thomas Hopkins*, for twenty-five dollars and fifty-nine cents, laid out and expended for the support and maintenance of a certain slave, belonging to the said *Hopkins*, in his life-time. The suit was brought under the second section of the act concerning slaves. (*Sess.* 24. c. 188.) The defendants below pleaded the general issue, and gave notice that they would give in evidence, at the trial, that the slave alluded to in the declaration of the plaintiffs, was the slave of *Hopkins*, in his life-time, and that the defendants, as his executors, before the expenditure of the money by the plaintiffs, to wit, on the 10th of *August*, *1807, manumitted the slave, by a certificate, or writing, for that purpose, and at, or immediately before, such manumission, obtained a *certificate*, signed by the overseers of the poor of the town where the defendants resided, or a major part of them, which certificate they caused to be registered in the office of the clerk of the town, &c. At the trial, it was proved that the slave in question, named *Jordan*, belonged to the testator in his life-time, and that the plaintiffs in error were executors, and that the defendants in error were overseers of the poor, &c. and had expended the sum demanded, as being requisite for the support of the slave, who was unable to maintain himself.

The defendant below then offered in evidence the following

certificate in writing: "*Oysterbay*, 10th *August*, 1807. We do hereby certify that the bearer, named *Jordan*, the property of *William Hopkins & Co.* appears to be under the age of fifty years, and of sufficient ability to get his own living.

"We do hereby manumit the same.

(Signed, "Daniel Youngs, } Overseers of the
"Jacob Van Wremlin, } Poor."

This certificate was endorsed as follows: "The within manumission is entered in the records of *Oysterbay* in book I. page 319, per *Jacobus Montfort*, Clerk." The certificate of manumission was not signed by the plaintiffs in error, and was delivered to the town clerk by *William Hopkins*, one of the plaintiffs in error.

This certificate was offered as conclusive evidence of the facts therein contained, and as sufficient to exonerate the executors from all future maintenance of the slave; but the court refused to admit the certificate as evidence.

The defendants below then offered in evidence the will of *Thomas Hopkins*, by which they were appointed his executors, and by which they were empowered to sell and dispose of all his estate, both real and personal; but the court below rejected the evidence. The defendants below then offered to prove, by *parol*, their intention, *bona fide*, to manumit the slave by the said certificate, or writing, but the court rejected the evidence, and charged the jury, that the matters offered in evidence by the defendants below were incompetent and insufficient to bar the plaintiffs' action, and that the jury ought to find a verdict for the plaintiffs below, for the amount stated in their declaration, and the jury found a verdict accordingly. A bill of exceptions was tendered to, and signed by, the court below.

*The cause was submitted to the court, without argument.

Per Curiam. The certificate of the overseers, rejected at the instance of the executors, was conclusive evidence of the age and ability of the slave, and sufficient to charge the town with his subsequent maintenance as a *pauper*. Whether the slave was duly manumitted, as respected his former owner, was a question between him and the owner, and not between the owner and the town. That certificate would, probably, be sufficient evidence of manumission, to conclude the owner, but the town have no further concern with that question, after having given the certificate required by law, and which the statute renders conclusive to exonerate the owner.

Judgment reversed.

(a) Evidence that a negro being imprisoned as a slave in New-York claimed his freedom, and was liberated by the police of the city, is inadmissible against the master. *Smith v. Hoff*, 1 Cowen, 127.

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evidence, to charge the town with the future maintenance of such slave, as a *pauper*.

Whether the slave was duly manumitted or not, as respected his former owner, was a question between the slave and such former owner, with which the town had no concern; but it seems that this was a manumission sufficient to conclude the owner. (a)

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MURRAY AND OTHERS *against* KELLOGG.

IN error, on *certiorari*, from the Justices' Court of the city and county of *New-York*.

Kellogg, the defendant in error, brought an action of *assumpsit* against *Murray, Lyman & Ogden*, the plaintiffs in error, in the court below, for wages due to him as a seaman on board the ship *Rolla*, owned by the plaintiffs in error, on a voyage from *New-York* to *Archangel*, in *Russia*. The plaintiff below also declared for a breach of the shipping articles.

On the trial of the cause, the shipping articles not being produced, pursuant to a notice given to the defendants for that purpose, parol evidence was given of their contents.

*The plaintiff proved that the defendants were owners of the ship; that he shipped on board, the 2d of *May*, 1809, and signed the usual shipping articles for a voyage from *New-York* to *Archangel*, in *Russia*, and back again to the port of *New-York*, at the wages of twenty-two dollars per month. The vessel sailed from *New-York*, but, without any assigned cause, went to *Sicily*, thence to *Sardinia*, and thence to *Messina*. She disposed of all her cargo at those places, excepting about twenty hogsheads of tobacco, and some sugar, and, at *Messina*, took in a cargo of salt. The vessel lay near seven months at *Messina*, during the greater part of which time the master was absent, having been to *Leghorn*. The vessel left *Messina*, bound, as was said, to *Gottenburgh*, but, when nearly off *Leghorn*, she was captured by a privateer, and carried into *Tobago*, in *Africa*; and, as was to be inferred from the evidence of one of the plaintiff's witnesses, with the connivance of the master of the *Rolla*. The vessel and cargo were condemned at *Tobago*, and sold to the Bey of *Tunis*. The vessel was captured the 26th *April*, 1810, and the plaintiff arrived at *Boston* in *April* or *May*, 1811. The captain told one of the witnesses that the plaintiff had shipped to go to *Archangel*, and back to *New-York*, and the witness signed the articles on this representation. He asked to read the articles, but one of the defendants said it was unnecessary, as that was the voyage; and it did not appear that the plaintiff read them.

On the part of the defendants, a witness testified, that he was on board the *Rolla*, during the voyage, which was described in the articles to be from *Middletown*, in *Connecticut*, to any port or ports in *Europe*, and the seamen shipped for the term of *three* years, and then back to the *United States*. The plaintiff signed the articles, and received a month's wages in advance, and received some money also in *Sicily* and *Sardinia*. The vessel was captured by a *French* privateer off *Minorca*.

The court below gave judgment for the plaintiff for one

A seaman signed articles for a voyage, as he understood, and as it was represented by the master, from *New-York* to *Archangel*, and back to *New-York*, though the articles were, in fact, for a

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voyage from *Middletown*, *Connecticut*, to any port or ports in *Europe*, for three years, and back to the *United States*. The vessel went from *New-York* to *Sicily*, *Sardinia* and *Messina*, at which places she disposed of her outward cargo, and took in a load of salt at *Messina*, where she lay seven months, during most of which time the captain was absent. She left *Messina* for *Gottenburgh*, and was captured off *Minorca* by a *French* privateer, and carried into *Tobago*, in *Africa*, and there condemned and sold.

The seaman, on his return to the *United States*, brought an action against the owners, to recover his whole wages, and for a breach of the shipping articles. It was

hundred and ninety dollars, being the amount of wages due to the plaintiff up to the time of the capture, after deducting the money he had received.

The cause was submitted to this court, without argument.

Per Curiam. The wages of the outward voyage were due at *Messina*, because freight was earned by the delivery of the outward cargo. The return states that the whole of the outward cargo was disposed of, "excepting about twenty hogsheads of tobacco, and some sugar."

*The only question in this case is, whether the recovery was not for too much, as wages were allowed up to the time of the capture. The ship lay seven months at *Messina*. What was the cause of this enormous delay does not appear. It is chargeable to the act of the captain, for he was absent nearly the whole of that time, and the seamen were not to lose their wages in such a case. The ship sailed from *Messina*, with a cargo of salt, and, as it was said, for *Gottenburgh*. This was a new intermediate *European* voyage; and, without imputing fraud to the captain, the capture put an end to the wages, as well as the freight arising upon this voyage. Perhaps it would be rigorous, and unreasonable, to deduce, from the loose testimony upon that point, a collusion between the master and the commander of the privateer; and if not, then wages were not to be allowed after the departure from *Messina*.

How much time elapsed between the departure and the capture does not appear. It may not have been three days, and for such a small and trifling excess in the damages, the judgment ought not to be reversed. If the capture was from concert and arrangement, the wages were clearly due up to the time of the capture, if not until the seamen could return to the *United States*.

Judgment affirmed.

the capture, and some evidence of collusion between the master and captors.(a)

(a) Where freight has not been earned, wages are not due. *Dunnett v. Tonchagen*, 3 Johns. Rep. 154. *Icard v. Gould*, 11 Johns. Rep. 279. But where the voyage is lost by the act of the master, the seamen are entitled to their wages to the time, and also for a reasonable time to return home. *Sullivan v. Morgan*, 11 Johns. Rep. 66. Vide *Porter v. Andrews*, *infra*, 350. *Van Buren v. Wilson*, 9 Cowen, 158.

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held that he was entitled to wages, at *Messina*, and during the stay

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there, the detention being the act of the captain; but not from *Messina*, that being on a new intermediate voyage, and the capture put an end to the freight as well as wages for that voyage; and where the wages were allowed in an inferior court up to the capture, the court refused to reverse the judgment on that account, the excess being trifling, and no evidence as to the time between the departure from *Messina* and

BEACH AND SAUNDERS against FURMAN.

IN error, on *certiorari*, from a justice's court. *Sarah Furman*, the plaintiff below, brought an action of trespass against *Beach* and *Saunders*, before the justice, for taking and carrying away a *cow, belonging to the plaintiff. The defendants below pleaded not guilty; and *Beach* pleaded also a justification, under the act to regulate highways, (*sess.* 24, c. 186,) passed 8th April, 1806. (a)

At the trial, it appeared that *Saunders*, one of the defendants, was a constable of the town of *Unadilla*, and a warrant

On a complaint made in writing to a justice of the

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peace, by an overseer of the highways, pur-

(a) 1 K. S. 510, 511. sec. 41-44.

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suant to a warrant issued by the commissioners of highways, under the act, (sess 24. c. 186,) stating that A., named in the warrant, had been warned to work on the highway, but had neglected or refused so to do; the justice issued his warrant to one of the constables of the town, commanding him to levy of the goods and chattels of A., the penalty prescribed by the act for such refusal; and the constable, by virtue of the warrant, took and sold the cow of A. It was held, that admitting A. not to be liable to be assessed to work on the highway, yet no action would lie against the justice or constable, who are mere ministerial officers, having no judi-

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cial or discretionary power, under the act; and, therefore, not responsible for issuing or executing the process directed by the authority of persons having jurisdiction over the subject matter. (a)

was issued by the commissioners of the highways of the town, directed to *William Merithew*, the overseer of the highways, commanding him to cause the number of days affixed to the respective names of the persons annexed to the warrant, to be worked on the public highway in his district, according to law; and on which list of names annexed to the warrant, the plaintiff was assessed to work eight days and a half. *Saunders* also produced a complaint in writing, directed to *A. I. Beach*, one of the defendants, who was one of the justices of the peace of the county of *Otsego*, by *S. Merithew*, overseer of the highways, stating that "he had warned *Sarah Furman* to work on the highways four days and a half, which she had neglected and refused to do." *Saunders* also gave in evidence a warrant issued by *A. I. Beach*, a justice of the peace, under his hand and seal, directed to any constable of the county, reciting the above-mentioned complaint, and commanding the constable to levy and make of the goods and chattels of *S. Furman*, four dollars and a half, being the penalty given by the act, and also twenty-five cents costs, &c. The return to the warrant stated that *Saunders*, the constable, had, by virtue thereof, levied on the cow of the said *S. Furman*, and had made thereof the sum mentioned, &c. There was no evidence against *Beach* the other defendant.

It appeared that *Sarah Furman* was a freeholder in the town of *Unadilla*. The justice gave judgment for the plaintiff below, for fifteen dollars and the costs.

Per Curiam. Whether *Sarah Furman*, being a woman and a freeholder, was liable to be assessed to work on the highways, is a question which does not necessarily arise in this case. Admitting her not to have been liable to be assessed, yet as she was assessed, and a complaint in writing made to the justice by the overseer of highways, of her default, the justice was not to inquire into the legality of the assessment, but was bound, by the act, forthwith to issue his warrant of distress, and the constable was equally bound to execute it. The act is peremptory, and leaves no judicial or discretionary power, either with the justice or constable, *and so the statute was understood by this court, in the case of *Bouten v. Neilson*. (3 Johns. Rep. 474.) That case, however, as well as the case of *Lawton v. Commissioners of Highways*, (2 Caines' Rep. 179,) proves, that the party aggrieved by such a proceeding is not without redress, for these summary proceedings may be removed into this court, and reviewed by a *certiorari*, to be directed to the justice, or overseer, as the case may be. Both the justice and the constable acted ministerially in this case; and a mere ministerial officer is not responsible for the issuing or the execution of process, so long as the authority under which the process is

(a) How far the law will protect its ministerial officers, see *Warner v. Shed*, 10 Johns. Rep. 138. *Snydam v. Keys*, 13 Johns. Rep. 444. *Smith v. Shaw*, 12 Johns. Rep. 257. *Cable v. Cooper*, 15 Johns. Rep. 152. *Savacool v. Boughton*, 5 Wend. 170. *Lewis v. Palmer*, 6 Wend. 367.

awarded, had jurisdiction over the subject matter. Now, the overseer of the highways was the person to designate, in the first instance, and to deliver to the commissioners, the names of the persons liable to be assessed; and he was also the officer to adjudge what persons were in default, and to demand the warrant. In the exercise of this authority, the overseer may have returned the names of persons not liable to assessment, and he may have adjudged persons in default, who were not in default. The remedy for the party so aggrieved, cannot be against the justice and constable, concerning in issuing and executing the warrant of distress, for they had no alternative but to obey, as the law did not give to either of them the right to inquire into the legality of the assessment, or the truth and sufficiency of the allegation of the default. The remedy must be either by an action against the overseer, or by removing the assessment, or the proceeding under it, into this court, so that the same may be quashed. It would be against the obvious principles of justice and policy, to make the ministerial officers act, in a case like this, at their peril, when they have no right to judge, and are required to act. They are only responsible as trespassers when they act under the authority of a person who had no jurisdiction in the case, or when they execute that authority irregularly.

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The remedy for the party aggrieved in such case, is either by an action against the overseer, or by removing the proceedings, by *certiorari*, into this court, where they may be quashed.

Whether a female, though a freeholder, is liable to be assessed to work on the public highways, *quære*. [Vide I. R. S. 505. sec. 19.]

Judgment reversed.

*WHITE against WARD AND AYLESWORTH.

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IN error, on *certiorari*, from a justice's court. *Ward* and *Aylesworth* brought an action against *White*, before the justice. The plaintiffs, in their declaration, stated, that on or about the 10th September, 1810, *White* alleged he had lost a *bridle*, and accused *Aylesworth* of taking it, and threatened to put him to trouble and costs, unless he would pay him the sum of twelve dollars in cash, or give him a note for the amount, with sufficient surety; upon which *Aylesworth*, (though innocent of taking the bridle,) to save himself from the trouble and expense of a prosecution, executed a note jointly with *Ward*, dated the 20th September, 1811, for the sum of twelve dollars, payable in three months, which note they afterwards paid; that *White* had recovered possession of his bridle, without the knowledge or aid of the plaintiffs, and refused to refund the money so paid by the plaintiffs, &c.

The defendant pleaded in bar a prior suit, brought by him against the plaintiffs, in April, 1811, before *Sutherland*, another justice, in which the plaintiffs neglected to set off their demand. The record of that suit was produced in evidence, by which it appeared that *White* sued the plaintiffs on the note in question, before the other justice, and recovered the amount of twelve dollars and the costs. The justice overruled

A. being arrested at the instance of *B.* on a charge of having taken *B.*'s bridle, to avoid further trouble and expense, *A.*, on the demand of *B.*, gave him a promissory note, for 12 dollars; and *B.* promised that if *A.* would ever show that he had not had the bridle, or that he was innocent of the charge, or if the bridle should be found, he would give up the note, and pay *A.* for his trouble.

B. sued *A.* before a justice on the note, and recovered judgment for the a

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mount, which was paid by A. A. afterwards brought an action before another justice against B., to recover back the money, on the ground, that he was inno-

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cent of the charge, and that B. had got his bridle again, without the knowledge or assistance of A., and it was held, that A. having neglected to set up this matter against the former suit on the note, to which it would have been a good defence, the former suit was a sufficient bar under the act. (a)

Money collected under a regular judgment, cannot be recovered

back, in a new suit, on the ground that evidence has since been discovered of a good defence, which existed before the judgment.

this defence. The plaintiffs then proved, that *Aylesworth* was arrested for taking the bridle, which he denied; and *White* told him, that if he would ever show that he had not had the bridle, or it should ever appear that A. was innocent, he would give up the note, or that if he should find the bridle, or if it should be found, and A. not appear to be guilty of taking it, *White* would pay him for his trouble; and *Aylesworth* said, rather than to be carried further, he would sign the note, which was accordingly done.

A witness testified that one *Harrington* told him that *White* gave him a dollar to say, and stand to it, that he saw *Aylesworth* with *White's* bridle, and that he did say so, in consequence of which the note was given, but that he would not have said so *under oath. This evidence was objected, but admitted by the justice.

The jury gave a verdict for the plaintiffs, for twenty dollars, on which the justice gave judgment.

Per Curiam. The first question is, whether the recovery by *White* on the note, in the action before the other justice, in which the plaintiffs neglected to set off their demand, was not a bar to this suit. We are of opinion that it was a sufficient bar. The grounds on which the plaintiffs recovered in this suit below, would have been a good defence for them, in the suit before justice *Sutherland*; and if the plaintiffs were not in a situation at that time to make out that defence, by proof, it was their misfortune. The money having been collected under a regular judgment, cannot be recovered back in a new suit, upon the allegation that evidence has since been discovered of a defence which existed before the judgment. On this ground, therefore, the judgment below must be reversed.

Judgment reversed.

(a) Vide *Loomis v. Pulver*, *infra*, 244.

LEONARD against WILKINS, JUN.

Where the dog of A. is on the land of B. chasing fowls, and in the act of destroying one, B. may lawfully shoot the dog, in the same manner as if the dog were chasing and killing sheep or other reclaimed and

IN error, on *certiorari*, from a justice's court. *Leonard* sued *Wilkins*, before the justice, for shooting the dog of the plaintiff. The defendant pleaded not guilty, and the cause was tried before a jury. It was proved that a dog, of the pointer breed, was possessed by the plaintiff, and that he had no other dog. The defendant said to one of the witnesses that he had shot the plaintiff's dog. Another witness saw the defendant shoot the dog, which was in the field of the defendant. The dog was running with a fowl in his mouth, and the defendant called after the dog before he fired; but he had the fowl in his mouth at the time he was shot. The plaintiff was

near the place at the time, on horseback, but it did not appear that the defendant saw him, or knew that he was near, until after he shot the dog. Several witnesses testified, that the same dog worried and injured their fowls *and geese; and that there was an alarm in the neighborhood respecting mad dogs.

The jury found a verdict that the plaintiff had no cause of action, on which the justice gave judgment against the plaintiff for the costs.

Per Curiam. The verdict below was not against law. The dog was on the land of the defendant, in the act of destroying a fowl; and the defendant was justified in killing him, in like manner as if he was chasing and killing sheep, deer, calves, or other reclaimed and useful animals. This principle has been frequently and solemnly determined. (*Cro. Jac.* 45. 3 *Lev.* 25.) It was for the jury to determine whether the killing was justified by the necessity of the case, and as requisite to preserve the fowl; and the fowl being on the land of the defendant was enough, without showing property in the fowl.

Judgment affirmed.

MANDELL, ASSIGNEE OF THE SHERIFF, &c. against BARRY AND OTHERS.

IN error, from the Court of Common Pleas, or Mayor's Court, of *Albany*.

The plaintiff in error, as assignee of the sheriff of *Albany*, brought an action of debt, in the court below, against the defendants, on a bail-bond, executed by *Barry*, who had been taken into custody of the sheriff, on a *ca. sa.*, and by *Harbeck* and *Hewson*, his sureties, for the gaol liberties granted to *Barry*, by the sheriff, pursuant to the act. The bond was in the usual form, conditioned, that "if *Barry* should remain a true and faithful prisoner, within the liberties of the gaol, and should not at any time, or in any wise, escape, or go without the limits of the gaol liberties, until he should be thence discharged by due course of law," the obligation to be void, &c. The plaintiff averred that *Barry* did not remain a true and faithful prisoner, &c. but that, afterwards, on the 12th of *August*, &c. did escape and go without the *limits of the said liberties, and without being thence discharged, by due course of law, &c. and that the sheriff, afterwards, assigned the bond to the plaintiff, according to the statute, &c. by reason whereof, &c.

The defendants pleaded, 1. *Non est factum*; 2. That *Barry* did remain a true and faithful prisoner, &c. with a verification; 3. That *Barry*, accidentally and inadvertently, and without intention to escape, stepped beyond the outline of the said liberties, which were bounded by an imaginary line of vague and

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useful animals. It is enough that the fowl is on the land of *B.*, without showing property in the fowl. The jury are to decide whether the killing of the dog is justified by the necessity of the case, and as requisite to preserve the fowl. (a)

(a) Vide *Putnam v. Payne*, 13 *Johns. Rep.* 312. *Hinckley v. Emerson*, 4 *Cowen*, 351.

The act of the 5th April, 1810, (*sess.* 33, c. 187,) is intended only for the relief of the sheriff, coroner or other officer, when sued for an escape.

Where an action, therefore, is brought by the assignee of the bond given to the sheriff, on granting the liberties of the gaol, against the original debtor and his sureties, on the

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bond, a voluntary return after a voluntary escape, and before suit bro't, is not a defence; and the assignee may recover the amount of the debt in the original suit, though no suit has been

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brought against
the sheriff for
the escape.
(a)

uncertain description, not designated by posts and marks; and did, afterwards, before the commencement of any suit against the sheriff, and before the assignment of the said bond, &c. voluntarily return within the liberties, &c. and hath ever since remained, and still remains, a true and faithful prisoner, &c. which is the same escape, &c. and this he is ready to verify, &c.

The plaintiff, protesting that *Barry* did escape, &c. and did not remain a true and faithful prisoner, *replied* to the second plea, that the said *Barry* did not remain a true and faithful prisoner, but did escape, &c. and on which issue to the country was joined. To the *third* plea, protesting that the matters therein contained were not sufficient in law, &c. the said *Barry*, without any such cause as the defendants in that plea alleged, did escape, &c. on which issue was also joined.

At the trial, the jury found a special verdict, from which it appeared that no suit had been brought against the sheriff for the escape, and the liberties were not, in the place where *Barry* escaped, marked by any visible boundaries, and that *Barry* stepped six or eight feet beyond the limits, to drive a cow to the end of a yard, and returned within the limits, within five or ten minutes thereafter; but that he knew, at the time, what the limits were. And they found, also, as to the third issue, that *Barry* did escape, and without any such cause as is set forth in the defendants' plea, &c. and they assessed the damages to the whole amount of the original debt for which *Barry* was in custody. On this verdict, the court below gave judgment for the plaintiff.

Henry, for the plaintiff in error, contended, that the jury, in assessing the damages, ought not to have made the debt in the original suit the measure of assessment. The bond given to the sheriff is merely for his *indemnity*; (2 *Johns. Cas.* 205;) and the return of the prisoner, before *action brought, is equivalent to a plea of *non damnificatus*. The act of the 28th *March*, 1809, (*sess.* 32. c. 148,) which was passed in consequence of the decision of this court, in *Tillman v. Lansing*, (4 *Johns. Rep.* 45,) renders the bond given to the sheriff for the gaol liberties, assignable; and declares that the party to whom it is assigned, may maintain an action thereon as assignee, and recover the amount due in the original action. The design of this statute was to prevent circuitry of action, and to stay the proceedings against the sheriff, until he had an opportunity of suing on the bond. But by the act of the 5th *April*, 1810, (*sess.* 33. c. 187,) sheriffs are restored to their common law defence of recaption, on fresh pursuit, and a returning of the prisoner within custody, before a suit is commenced for the escape, as fully as if the act relative to the gaol liberties, or making the bonds assignable, had never passed.

(a) The judgment in this case was reversed on error. Vide *Barry v. Mandell*, 10 *Johns. Rep.* 563. See also 2 *R.S.* 436, sec 55—59.

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The rule of damages prescribed by the act of the 28th *March*, 1809, was to prevail, after the court had decided upon the absolute responsibility of the sheriff; but the act of 8th *April*, 1810, restoring the sheriff to his common law defence, is a virtual repeal of the rule of damages given by the former act. If such be not the interpretation, the sheriff, if sued for the escape, may avail himself of this defence at common law, and prevent any recovery against him; and afterwards sue on the bond, and recover the whole amount of the original debt.

The assignee, in this case, cannot claim to be in a different or better situation than the assignor, or original obligee.

Again, this is the case of a *surety*, and the object of the bond is merely the *indemnity* of the sheriff. If the sheriff cannot, then, be damnified, ought the surety to be made liable on this bond, beyond the scope of his engagement? The reason of the measure of damages given by the act of the 28th *March*, 1809, has ceased, and been virtually repealed. The maxim of the law *cessante ratione, cessat et ipsa lex*, is strictly applicable. By every rule of sound construction, such must be the operation of the act of *April* 5, 1810. (4 *Bac. Abr. Stat.* I. 4.)

It would be extremely hard and unreasonable, in this case, to apply a rule of damages to the *surety*, and make him liable to the amount of the original debt, when it is not applied to the sheriff, in a suit against him. And how can an assignee possess greater or other rights, in regard to the subject assigned, than the assignor?

**J. Hamilton*, contra, was stopped by the court.

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Per Curiam. The escape charged in the declaration, in the suit below, was found, by the special verdict, to have been voluntarily and intentionally made. This is the necessary and inevitable inference from the matters of fact found in respect to the second plea; and, as to the third plea, the jury expressly say, that the escape was made without any such cause as was set forth in that plea, that is, it was not "accidentally and inadvertently, and without intention to escape." The only question, then, arising upon the record is, whether a voluntary return, after a voluntary escape, and before suit brought, be a defence to a suit brought for such escape, by the assignee of the sheriff. The history of the several statutes upon this subject is, briefly, as follows:

By the act of 30th *March*, 1801, c. 91, gaol liberties were established, and prisoners were entitled to the benefit of them, on giving bond, with sufficient sureties, to the sheriff, that they would "remain true and faithful prisoners, and not, at any time, nor in any wise, escape." Under this act it was decided, in *Tillman v. Lansing*, (4 *Johns. Rep.* 45,) that the bond was forfeited after a voluntary escape, and that the sheriff (who alone was liable, under that act, to be sued by the plaintiff for the escape) could not plead a return before suit brought.

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The grounds of that decision the court see no reason to question. They were further considered and enforced by two of the judges of this court, in the case of *Dash v. Van Vleeck*; (7 *Johns. Rep.* 510;) and the provisions in the second and third sections of the act of 28th *March*, 1809, (c. 148,) were evidently made in consequence of, and in affirmance of, that decision. The act of 1809, also, made these bonds, given for the gaol liberties, assignable to the plaintiff, and authorized him to sue as assignee of the sheriff. Nothing was done by this act to alter or enlarge the nature of the defence. The bond remained forfeited after a voluntary escape, and the remedy upon it complete, as under the act of 1801. But the act of 5th *April*, 1810, (*sess.* 33. c. 187,) made a new provision in respect to the defence in a suit against the sheriff, and enacted, "that nothing contained in the acts of 1801, or 1809, aforesaid, should be so construed as to prevent any sheriff, coroner, or other officer, in cases of escapes, from availing himself, as at common law, of a defence arising from a recaption on fresh pursuit, and a returning of the prisoner within the custody of such *officer, before an action shall be commenced for the escape." The words of this act apply only to relieve the sheriff, coroner, or other officer, when they are sued for the escape. The act has no application to a suit upon the bond, either by the sheriff or by his assignee. It was made to relieve the officer, who may be an innocent party, and not the original debtor, who bound himself "to remain a true and faithful prisoner," and that he would "in no wise escape." If he has wilfully departed from the liberties, he has broken his engagement, and forfeited all just title to indulgence. The persons who became his sureties (and who were, probably, indemnified by him) must, and ought to, be equally responsible with the debtor, or otherwise the guard hereby intended against fraud would be illusory, and of no effect. They ought especially to be held so, when they join with him in his defence, for it would be impossible, and contrary to all rule, to allow to one defendant the plea of a voluntary return, and not to the other. The fact of, *how long* the prisoner continued without the liberties, or *to what distance* he escaped, never can be material, when it is once ascertained that the escape was voluntary and intentional.

The court are perfectly satisfied that, according to the letter and spirit of the several statutes upon this subject, as well as upon principles of justice and sound policy, the party to the bond cannot set up as a defence to a breach of the bond for a voluntary escape, that the prisoner voluntarily returned before suit brought, and the judgment below must, accordingly, be affirmed.

Judgment affirmed.

***IN THE MATTER OF JEREMIAH FERGUSON, A SOLDIER
IN THE UNITED STATES ARMY.**

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APPLICATION was made to the court for the allowance of a writ of *habeas corpus*, directed to *John Christie*, a lieutenant-colonel in the army of the *United States*, to bring up the body of *Jeremiah Ferguson*. The application was founded upon the affidavit of the father of *Ferguson*, in which he stated that *Jeremiah Ferguson* is an enlisted soldier in the thirteenth regiment of infantry, in the army of the *United States*, now under the command of *John Christie*, and that the said *Jeremiah* is an infant, under the age of twenty-one years, viz. of the age of seventeen years and nine months; and that he enlisted without the consent of his father, and is desirous of being released and discharged.

KENT, Ch. J. The cause of the detention of the prisoner being fully and distinctly detailed in the affidavit, an important question, arising upon the motion is, whether this court has jurisdiction in the case.

A similar application was made to this court, in *July* term, 1799, in the case of *Husted*, who was stated to be an enlisted soldier, (1 *Johns. Cases*, 136,) and the motion was denied; but the court gave no opinion on the question of jurisdiction. The only case I have met with, in which this question has been considered, is that of *Emanuel Roberts*, which arose in *Maryland*, in 1809. (2 *Hall's Law Journal*, 192.) The *habeas corpus* was awarded in that case, upon affidavit that the person had been seized and forcibly carried on board of a public vessel, belonging to the *United States*, then lying in the harbor of *Baltimore*, and where he was detained. By the return of the writ, it appeared that *Roberts* had voluntarily enlisted in the naval service of the *United States*; and the court declared it to be a proceeding under the authority of the *United States*, and that they "had no right to interfere," although it was alleged, that the party was only sixteen years of age, and was drunk when enlisted.

As far as that case goes, it is an authority against the jurisdiction of the state courts; and yet *Nicholson*, Ch. J. in delivering the opinion of the court, seemed to consider, that there might be cases in which it would be the duty of the state courts to interfere, *even though the imprisonment was under color of the authority of the *United States*.

As far as I have reflected upon the question, I have been led to conclude that our jurisdiction does not depend upon the greater or less degree of aggravation in the case, and that we have either no jurisdiction at all, or a completely concurrent jurisdiction, in granting relief upon *habeas corpus*, in all cases of unlawful imprisonment, by an officer of the *United States*, under color or by pretext of the authority of the *United States*.

The allowance of a writ of *habeas corpus*, in term time, is a matter of sound legal discretion; and when it appeared, on an application for the allowance of such a writ, that the party was a soldier in the army of the *United States*, enlisted by one of the officers of the *United States* army, the court refused to grant the allowance, as it was a matter arising under or by color of the authority of the *United States*, and a judge of the *Supreme Court* of the *United States*, or the *District Court* of the *United States*, had clear and unquestionable jurisdiction in the matter, and could afford the party the requisite relief.

Whether a state court has jurisdiction to allow a *habeas corpus* in such a case? *dubatur.* (a)

(a) The enlistment of a minor without the con-

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sent of his parent or guardian, into the army of the U. S. is void; and he may be discharged by state authority. *Matter of Carlton*, 7 Cowen, 471. See the case of *The Commonwealth*

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v. *Alexander
Murray*, 4 Binn.
487. See also
Ex parte Smith,
5 Cowen, 273.
*Ex parte Lock-
ington*, *Whar-
ton's Dig.* 386.
*Matter of Sta-
-u*, 10 *Johns.*
Rep. 328.

The present case being one of an enlistment under color of the authority of the *United States*, and by an officer of that government, the federal courts have complete and perfect jurisdiction in the case ; and there is no need of the jurisdiction or interference of the state courts ; nor does it appear to me to be fit, that the state courts should be inquiring into the abuse of the exercise of the authority of the general government. Numberless cases may be supposed of the abuse of power, by the civil and military officers of the government of the *United States* ; but the courts of the *United States* have competent authority to correct all such abuses, and they are bound to exercise that authority. The responsibility is with them, not with us ; and we have no reason to doubt of their readiness, as well as ability, to correct and punish every abuse of power, under that government. The judicial power of the *United States* is commensurate with every case, arising under the laws of the union ; and the act of congress (*Laws of U. S.* vol. 1. 53. 55) gives to the federal courts, exclusively of the courts of the general states, cognisance of all crimes and offences, cognisable under the authority of the *United States*. If the soldier, in the present case, be detained against his will, knowing him to be an infant, or if, though an adult, he has been compelled to enlist, by *duress* or violence, it is a public offence, but an offence of which this court cannot take cognisance. An abuse of the authority of the *United States* is an offence against the *United States*, and exclusively cognisable in their courts. When the state courts have not jurisdiction over the whole subject matter of the imprisonment, and when the federal courts have such jurisdiction, by indictment, as well as by *habeas corpus*, there appears to me to be a manifest want of jurisdiction in the case.

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The want of jurisdiction over the offence of unlawful imprisonment by indictment, seems equally to exclude the collateral remedy by *habeas corpus*, except where a jurisdiction, *in the latter case, is specially conferred. The writ of *habeas corpus*, as applied to such purposes, is a prerogative writ, and the issuing of it, in term time, rests in sound legal discretion. There appears to be an incongruity in such a maimed jurisdiction, as this court would possess, of having a right to deliver from an illegal imprisonment, and yet no right to call to an account the authors of such illegality and oppression. The general principle is, that if a court has no jurisdiction of the principal question, it has none of its consequences and incidents. Thus it is laid down that a common law court has no cognisance of any question incidental to that of *prize*, because they are incompetent to embrace the whole subject matter. (*Le Caux v. Eden*, *Doug.* 594.) It would be easy to state and multiply difficulties in the exercise of any jurisdiction, in cases arising under the exercise of the authority of the government of the *United States*, or in drawing with precision, any

line between the cases in which we may, and in which we may not, interfere by *habeas corpus*. Suppose the marshal of the district was to detain a person in prison, under color of process, when it could be shown to this court that the process was void, or that the arrest was after the return-day, would a state court undertake to deliver the party from the marshal's custody? I presume not, and yet I see no reason for any distinction, as to the question of jurisdiction, between that case and the present. The detention in each case is by an officer of the *United States*, under color of its authority.

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The civil remedy of the party by private suit in a state court, is a distinct question, not before us; and in cases of private suits, the state courts have, in most cases, by the act of congress, a concurrent jurisdiction. My conclusion is, that it would not only be unfit for the court to interpose in this case, so long as the courts and judges of the *United States* have ample and perfect jurisdiction over the whole subject matter, but that it would also be exercising power without any jurisdiction, and, therefore, I am of opinion, that the writ ought to be denied.

THOMPSON, J. I concur in refusing the allowance of the *habeas corpus*; but think it unnecessary to disclaim having jurisdiction, in any case, where the imprisonment or restraint is under color of the authority of the *United States*. Questions of jurisdiction between the *United States* courts and the state courts are generally nice and delicate subjects. I should be unwilling *to assume jurisdiction, where we have it not. And I do not feel myself at liberty to renounce it, when it is given to this court. The case of *Emanuel Roberts*, referred to by the *Chief Justice*, seems to be the only one where this question has received a judicial decision; and although in that case, the *habeas corpus* was denied, yet *Nicholson*, Ch. J. said there might be cases in which it would be the duty of the state courts to interfere. The immediate object of a *habeas corpus* is to liberate the party from an illegal restraint. The allowance of it does not necessarily draw after it an inquiry into any offence, committed either by the party imprisoned, or by him who assumes the right of restraint. The criminal offence is still open to the cognisance of the proper tribunal. The state courts must have the power, in many cases, to determine upon the extent and operation of the laws of congress. As in the case now before us, if a *civil* suit should be brought for false imprisonment, *the legality of the enlistment*, under the act of congress, would probably be involved, and must be determined collaterally. And this is the only inquiry upon the *habeas corpus*. The objections, however, stated by the *Chief Justice*, against the jurisdiction of this court, are entitled to great consideration, and as the allowance of the writ, in term time, rests in sound legal discretion; and as the party may have relief by application to one of the judges of the Su-

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preme Court of the *United States*, or of the District Court for this district, whose jurisdiction in the case is unquestionable I think the application ought to be denied.

SPENCER, J. VAN NESS, J. and YATES, J. concurred; expressly reserving themselves as to the question of jurisdiction but agreeing, for the reasons assigned by THOMPSON, J. that the application ought to be refused.

Motion denied

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*BURNELL against JOHNSON.

A judgment was confessed, without process, by B. in favor of A. before a justice, and execution taken out immediately, by consent, and delivered to a constable, and before any levy made, C. gave the constable a receipt for the household goods, &c. of B., and the goods were afterwards sold by consent of B., in mass, by the constable without seeing them, and after the execution had expired.

A. became the purchaser, and the goods were left in the possession of B., and C. gave a receipt to A. to account for them.

While the goods were thus in possession of B. they were taken by another execution against B. at the suit of D.

In an action of *trover*, bro't by C. it was held, that the transaction as between A., B. and C. was fraudulent, and

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that C. had no property in the

IN error, on *certiorari*, from a justice's court. *Johnson* brought an action of *trover* against *Burnell*, before the justice for certain articles of household furniture. It was proved, at the trial, that the goods claimed by the plaintiff had been sold on two executions, issued by a justice's court, in favor of *Jesse Killburne* against *Jesse Townsend*, on judgments confessed by him, without process, before the justice, on the 28th of *March*, 1811, and the executions were, by consent of the parties, issued immediately. On the 3d of *April*, and before any levy was made by the constable, *Townsend* delivered to the constable a receipt for the property in question, signed by *Johnson*. The constable, without any actual levy, advertised the property for sale on the execution, and, by the consent of *Killburne*, adjourned the sale, and again advertised the property, and again, by consent, adjourned and advertised the sale for the 2d of *July*. One part of the property, consisting of painters' colors, tools, &c. was sold in one lot, and the household furniture, without being seen by the constable, was sold together in another lot, and the whole was purchased by *Killburne* for twenty-five dollars. The sale was made with the consent of *Townsend*. The executions, which had expired, had not been renewed. The property was left in the possession of *Townsend*, and, afterwards, on the 12th of *July*, *Johnson* gave *Killburne* a receipt for the property, engaging to return it to him when called for, or to pay him for it. While the property was thus in the possession of *Townsend*, it was taken by *Burnell*, the defendant below, another constable, on the 15th of *July*, by virtue of an execution in favor of one *Hurd* against *Townsend*, issued on a judgment obtained the 22d of *June*. The jury found a verdict for *Johnson*, the plaintiff below, for eleven dollars and seventy-five cents, on which the justice gave judgment.

Per Curiam. Here are too many circumstances of fraud attending *Johnson's* claim to the goods, to permit the recovery to be supported. It was a verdict against the conclusions of law. The judgments from *Townsend* to *Killburne* were confessed without *process, and without any consideration appearing, and, by consent, execution was immediately taken

out. *Johnson* then immediately appears in the transaction, and receipts to *Townsend* for the goods, but they appear still to be in *Townsend's* possession. Why *Johnson* gave a receipt for the goods is not shown. After several advertisements and adjournments, the goods are sold by consent of *Townsend*, and while in his possession, and without ever being seen by the constable, they are bought by *Killburne*, and *Johnson* again gave a receipt for them, and left them in possession of *Townsend*, until they were seized and sold by *Burnell* to satisfy the judgment of another creditor. From these facts, there does not appear to be any color or pretence of property, or possession, in *Johnson*, and consequently, he had no right of action.

Judgment reversed.

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goods, which were liable to the second execution. (a)

(a) Vide *Whipple v. Foot*, 2 *Johns. R.* 418. *Doty v. Turner*, 8 *J. R.* 20. *Rew v. Barber*, 3 *Cowen*, 272. *Farrington v. Caswell*, 15 *Johns. R.* 430.

LOOMIS against PULVER.

IN error, on *certiorari*, from a justice's court. *Pulver* sued *Loomis* before the justice, for money had and received, &c. *Pulver* offered to prove that, in 1808, he gave *Loomis* two promissory notes payable on demand, which he transferred to *S. L.*, who, about a week before the trial, in 1810, sued the plaintiff, and recovered the amount of the notes; and that previous to the transfer to *S. L.*, *Pulver* had paid the amount of the notes to *Loomis*. This evidence was objected to, but the justice overruled the objection. The plaintiff then proved that the defendant declared that he had settled all accounts with the plaintiff, and that he owed him four cents. It did not appear, however, that any thing was said about the notes, at the time of the settlement.

On this evidence, the jury found a verdict for the plaintiff, for fifteen dollars, on which the justice gave judgment.

Per Curiam. Several objections were stated to this recovery, but the principal one is, that the plaintiff ought to have set up this payment as a defence against the notes. As the notes were payable *on demand, and not negotiated until two years after the date of them, the person to whom they were transferred took them subject to all equity, and to the previous payment, or accounts, against the defendant. There is no doubt that this formed a good defence against the notes; and if the plaintiff neglected to make this defence, he is precluded from making that recovery a ground of action against the defendant. This was the acknowledged doctrine, in the case of *Le Guen v. Gouverneur & Kemble*. (1 *Johns. Cas.* 436.) On this ground, the judgment was erroneous, and must be reversed.

A. in 1808, gave B. a promissory note payable on demand, which B. afterwards, transferred to C. who, in 1810, sued A. on the note before a justice and recovered the amount, though A. had previously settled and paid it to B. It was held, that C. took the note subject to all equity between A. and B., but that A. ought to have set up the payment to B. as a defence to the suit brought by

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C. and not having done so, he could not make the recovery a ground of an action for money had and received, against B. (a)

(a) Vide *White v. Ward*, *supra* 232.

Judgment reversed.

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WATKINS.

The admea-
surers of dower

(a) 2 R. S.
489—491. sec.
10—17.

appointed un-
der the act
(sess. 29. ch.
163,) are not to
do execution,
but are like
commissioners,
to set off one-
third in value
of the estates,
so as to prevent
all difficulty, or
contention, be-
tween the wid-
ow, and heir or
tenant, as to the
just extent or
ascertainment
of dower; and
it seems, that
notice of the
time of admea-
surement is not
requisite, but
where the ad-
measurers met

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at the house of
the heir and re-
quested him to
show the pre-
mises, and he
refused to have
any thing to do
with the busi-
ness, that was
held a sufficient
notice, in the
first instance,
and a waiver
of all further
notice. (a)

(a) But notice
in writing must
be given of the
application to
the surrogate
for the appoint-
ment of ad-

(a) 2 R. S.
at sup.
measurers.

Matter of Co-
oper, 15 Johns. R.
533. Rathbun v.
Miller, 6 Johns.
Rep. 281. Vide
Coates v. Chee-
ser, 1 Co. 460.

IN THE MATTER OF MARTHA WATKINS, WIDOW, &c.

APPLICATION was made by *Samuel Watkins*, the son and heir of *Samuel Watkins*, deceased, pursuant to the tenth section of the act of the 7th April, 1806, (sess. 29. c. 168,) (a) for relief against the assignment of dower of *Martha Watkins*, the widow of *S. Watkins*, deceased.

The affidavit of the surrogate stated, that the widow applied to him for the assignment of her dower, on which he directed a citation to show cause on a day certain, which was duly served on *S. W.* the heir, who on the day appeared with his attorney; and the hearing was postponed, by consent, to another day certain; at which day no cause was shown; and he thereupon appointed three freeholders to be admeasurers of dower.

The report of the admeasurers stated, that they had set off to the widow, the *land* by metes and bounds, out of one hundred forty acres, and the common use of the entry and stairs of the dwelling-house, above and below stairs, and the right of partitioning off part of the cellar, for her separate use, the privilege of using the well, room for a cow-yard, and the separate use of the horse-shed.

The affidavit of *S. W.*, the heir, stated that he was not present at the admeasurement, and had no notice of the admeasurers' proceeding to make it; that more than *one-third* of the estate, in value, *had been set off, and the best part of the dwelling-house, with three rooms and fireplaces, leaving only one room and fireplace to the heir; that sixteen acres of land adjoining to the road, were set off to the widow, and no way left from the remaining land to the road; that by the will of the deceased, there was given to the widow the front room of the dwelling-house, front chamber, kitchen and cellar, and stable room for a horse, and that the widow was aged sixty years.

The affidavit of the commissioners stated, that they met at the house of *S. W.*, the heir, in the summer of 1811, and requested him to attend and show the premises, and he said that he should have nothing to do with it, and wholly declined having any concern in the proceedings; that in setting off the sixteen acres south of the road, the commissioners left a passage, or way, two or three rods wide, in order to give to *S. W.*, the heir, a free passage from his land to the road.

Per Curiam. The proceedings before the surrogate, under the act of the 29th session, c. 168, (a) are founded on the assumption that the widow is entitled to her dower out of the estate in question, and that it is only to be designated and set off. There is no provision for trying, before the surrogate, the title to dower; and the admeasurement to be made, in pursuance of his order, cannot affect or prejudice the right to dow-

er, or the legal or equitable bar to it. Those rights, if litigated, remain open for investigation in the ordinary course of justice. In reviewing the proceedings had under the surrogate's order, we are, then, only to consider whether they have been fair and equitable. The admeasurers are not to do execution, as the sheriff does, on a writ of *habere facias seisinam*. They are in the nature of commissioners, to set off the one-third in value of the estate, so as to prevent all difficulty and contention between the widow and the heir or tenant, as to the just extent or ascertainment of her dower. But if the right to dower be denied, the party may protect his possession, notwithstanding the admeasurement, and drive her to her action at law. We have, therefore, nothing to do in this case with the question, whether the widow's acceptance of the provision under the will, formed a legal or equitable bar of her dower, though the court do not mean to intimate that they see any thing in the will to furnish ground for such an objection.

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*There are but two objections to the proceedings; 1. The want of notice; 2. The inequality and injustice of the admeasurement.

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1. The allegation of the want of notice is completely and fully denied. The complainant was, in the first instance, cited before the surrogate, to show cause, and he appeared; and on the day to which the hearing was afterwards adjourned, by consent, he did not appear, and the admeasurers were appointed. He had likewise notice to attend the survey, and setting off the dower; for the commissioners met at his house for the purpose, and he expressly refused to show them the premises, or to have any thing to do in the business. If notice of the admeasurement was requisite, here was sufficient notice, in the first instance, and a waiver of the necessity of any further notice. But the court do not mean to say, that notice by the admeasurers, of the time of admeasurement, was requisite. It is not required on the execution of an *elegit*, (*Tidd's Prac. K. B.* 950,) and that is a proceeding more solemn, and very analogous to this.

2. On the merits of the admeasurement, there is not sufficient cause shown for the court to interfere. The objection to the want of a way across the sixteen acres to the road, is not true in fact; for it appears, by the affidavit of one of the commissioners, that a sufficient passage was laid out, for the express purpose of enabling the complainant to communicate with the road. And as, to the main charge, that more than one-third in value of the land is laid out, it rests in the mere assertion of the complainant, without facts from which the court can deduce the conclusion. A reasonable confidence must be reposed in the admeasurement, and in the discretion and intelligence of the commissioners; nor can the court say, that the dower assigned in the buildings is unequal, for the

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widow had an interest in them under the will, and independent of the right of dower.. As far as the court can judge from the return, the admeasurement is just and convenient.

Motion denied.

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*DURYEE against ORCOTT.

A. hired a horse in Dutchess county, to go a journey to Albany, and sold him in Washington county, and escaped into Canada. An action of *trover* was brought by the owner, and the venue was laid in Dutchess. It was held that the place where the cause of action arose, was, *prima facie*, the place where the venue ought to be laid; and if the defendant shows where the cause of action arose exclusively, and that he has material witnesses residing there, he has a right to carry the venue there; and he cannot be de-vested of this right unless the plaintiff stipulates to give evidence arising in the county where he has laid the venue, and states also, by affidavit, that he has material witnesses residing in that county. (a)

H. BLEECKER, for the plaintiff in error, moved that the rule obtained at the last term, to change the *venue*, in this cause, from the county of *Dutchess* to the county of *Washington*, be vacated.

The action was *trover* for a horse, chair and harness. The affidavit of the plaintiff stated, that in *July*, 1811, he let the horse, &c. in *Rhinebeck*, in *Dutchess* county, to a person of the name of *Phillips*, to go to *Albany*, who was to return in three or four days, but not returning, the plaintiff went in pursuit of him, and found that he had gone to *Canada*, and in passing through *Cambridge*, in *Washington* county, had sold the horse, &c. in that place. The plaintiff found them in possession of the defendant, and claimed them as his property, but the defendant refused to deliver them, alleging he had purchased them at a fair price, unless the plaintiff would pay him the price.

The plaintiff also stated, that he had six witnesses, whom he named, material for his defence, residing in *Rhinebeck*, in *Dutchess* county, and another material witness at *Hudson*, in *Columbia* county.

The rule for changing the *venue* had been obtained at the last term, in consequence of some error in the affidavit of the plaintiff's attorney, intended to be used in opposition, and neglecting to instruct the counsel, as to the motion.

D. Russell, contra, read an affidavit of the defendant, stating that the cause of action, if any, arose in the county of *Washington*, and not in the county of *Dutchess*, and that he had as many as ten witnesses, whom he named, residing in *Cambridge*, in the county of *Washington*, whose testimony was material on the trial of the cause.

Per Curiam. In *Ross v. Lown*, (8 Johns. Rep. 354,) the court said, that the rule laid down in *Manning v. Downing*, (2 Johns. Rep. 453,) had not been extended to a case for trespass *de bonis asportatis*; and in that case, we adopted the practice of the King's Bench, in *England*, and required the plaintiff to stipulate to give material evidence arising in *Onondaga*, to entitle him to retain the *venue* there, it appearing that the plaintiff had two witnesses *residing in *Onondaga*, and the defendant four in *Saratoga*, in which latter county the cause of action arose.

There are transitory actions, in which the *venue* is altogether optional with the plaintiff. In this class we have placed

(a) Acc. *Serilly v. Wells*, 1 Cowen, 196. *Vander Zee v. Van Dyck*, Id. 600. And see *Hall v. Cox*, 4 Cowen, 15. *Atkinson v. Holcomb*, 4 Cowen, 45. *Wood v. Bishop*, 5 Cowen, 414. *Tillinghast v. King*, 6 Cowen, 591. Note (a) to *Ross v. Lown*, 8 Johns. Rep. 354.

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generally, all actions arising on contract. It includes, also, actions (1 *Tidd's Pr.* 174,) arising beyond sea, or out of the state, for libels dispersed in several counties, for escapes, or false returns, against a carrier, on a specialty, note, or bill of exchange, and wherever the cause of action is not wholly, or necessarily, confined to a single county. In these cases, the *venue* will not be changed, but upon special grounds, as where the witnesses of both parties reside in the county to which the defendant wishes to bring the *venue*. If the plaintiff's witnesses reside in the county in which he has laid the *venue*, unless there is a great and striking preponderance against him, the *venue* will not be changed. (a)

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(a) *Acc. Root v. King, 4 Cowen, 403.* And see *Goodrich v. Clarin, 6 Cowen, 397.*

In *trover*, the plaintiff has not an option as to the *venue*. The place where the cause of action arose is, *prima facie*, the place where the *venue* ought to be; and if the defendant shows, by affidavit, where the cause of action arose, exclusively, and that he has witnesses material to his defence residing in that county, he has a right to have the *venue* there. The plaintiff cannot divest him of this right, but by stipulating to give evidence arising in the county where he has laid the *venue*, and, in addition to that, stating, by affidavit, that he has witnesses material to his cause residing in that county. In the present case, the plaintiff having witnesses in the county of *Dutchess*, let him stipulate to give evidence arising in that county, and let the *venue* be carried back there.

Rule accordingly.

*BANCKER against ASH.

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LAWRENCE against THE SAME.

HENRY, for the defendant, moved to set aside the inquests taken at the last sittings, in these causes. They were actions of *assumpsit*; and the general issue was pleaded, in *March*, 1811. In *July*, 1811, the defendant was discharged, by the recorder of *New-York*, under the insolvent act. In *August* the defendant pleaded the discharge in bar, by pleas *puis darrein continuance*, which were duly filed, and served at the time; but there was no affidavit of the truth of the pleas. The attorney for the plaintiff took no notice of the pleas, but treated them as nullities; and, at the sittings, took the inquest by default.

Van Vechten, contra.

Per Curiam. These were not pleas in abatement, but in bar, and an affidavit verifying them was not required by the statute. If necessary to give them validity, it must be in consequence of the course and practice of the court, as derived from the *English* authorities. But the cases, and the reason on which they are founded, do not apply to such pleas, unless they are pleaded at the circuit, and then it seems to be in the

A plea in bar, as of a discharge under the insolvent act, pleaded *puis darrein continuance*, need not be verified by affidavit, unless tendered at the circuit or sittings, nor then, if probable cause of its truth be shown to the judge, who may receive it without oath, or not, in his discretion. A plea *puis darrein continuance*, may, in general, be pleaded without being verified by affidavit.

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LE WORTHY.

Jackson v.
Peer, 4 Cowen,
418.

When such a plea is pleaded in bank, without an affidavit, it cannot be treated as a nullity, but the plaintiff must either reply to it, or apply to the court to have it set aside. (a)

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(a) Acc. Morgan v. Dyer, infra, 255. S. C. 10 Johns. Rep. 161. The plaintiff cannot demur to such a plea. 10 Johns. Rep. ut sup. Ludlow v. M'Crea, 1 Wendell, 228.

discretion of the judge. Thus, in *Abbot v. Rugesley*, Trin. 26 Car. II. (*Freem.* 252,) it was held, "that he that offers a plea *puis darrein continuance*, at the *nisi prius*, ought to prove it there; for, unless he make it appear to the judge that it is a true plea, it is in his discretion whether he will allow it or not, but may proceed to try the cause." In the case of *Martin v. Wyvill*, (1 Str. 492,) the plea was not pleaded, at the circuit, and the plaintiff, instead of treating it as a nullity, moved to set it aside on grounds, one of which was, that it was false on the face of it; and for that reason, the court set it aside, and said, that "it was constant experience, at the assises, to put the party to verify such a plea before it is allowed, and if the party does not give some evidence of the truth of it, the judge will reject it, and go on with the cause."

In *Paris v. Salkeld*, (2 Wils. 137,) the plea was verified by affidavit; and the question there was, whether it was not still in the discretion of the court to receive or reject it, and they determined it could not be rejected, if so verified. Such a plea, in *Hawkins v. Moor*, (Cro. Car. 261,) was pleaded at the assises, without affidavit, and was a mere dilatory plea, and it was afterwards held, in bank, that the plea was receivable, "at the discretion of the justices, if they perceive any verity therein."

The rule, therefore, requiring a plea *puis darrein continuance* to be verified by affidavit, grew out of the practice of tendering such a plea at the assises, or circuit, and was intended to prevent the abuse of interposing such a plea, for delay, as the circuit judge had no authority to try it. If probable cause of its truth be shown to the circuit judge, he may receive it without oath. It rests in his sound discretion. But when such a plea is pleaded in bar, not at the circuit, but in bank, the plaintiff is not warranted, by any of the authorities, to treat it as a nullity. He ought at least to apply to the court to have set it aside, as their discretion to receive it or not, without oath, must at least be as perfect as that of the judge at *nisi prius*; and besides, the reason of the practice of requiring the affidavit of its truth does not apply at all, or with very diminished force, to such a case. Motions granted.

BRADWAY, *qui tam*, &c. against LE WORTHY.

It is in the discretion of the court, under the statute, (sess. 11. ch. 9. s. 8,) to allow an informer or plaintiff in a popular action on a penal statute, to compound, upon

GOLD, in behalf of the plaintiff, moved for leave to enter a discontinuance in this cause. He read an affidavit of the plaintiff, stating, that he had no interest whatever in the cause; that at the request of J. Gilbert, and E. Griffin, he lent his name to bring the present action, which was against the defendant, under the third section of the act for preventing usury, for taking usury of one O. Dodge, and they engaged

to indemnify the plaintiff from all costs. The plaintiff had also executed a release of the suit. The defendant's affidavit, also, stated that the cause had been settled and discharged.

Kirkland, contra, read the affidavits of *E. Griffin*, attorney for *the plaintiff, and *J. Gilbert*, expressly contradicting the facts stated in the plaintiff's affidavit, and that the plaintiff had absconded, without paying the costs, having, as they had reason to believe, obtained a considerable sum of money for discharging the suit; that a verdict had been obtained against the defendant in the suit, but the judgment was arrested for a defect in the declaration.

Per Curiam. By the statute *to redress disorders by common informers, &c.* (sess. 11. c. 9. s. 8,) (a) it is declared, that no informer, or plaintiff, in any action popular, shall compound, or agree with the offender, without the order or consent of the court, in which the suit shall be depending. This is a transcript of the *English* statute of 18 *Eliz.* c. 5. s. 3, the construction of which, in the *English* courts, has been, that it is in the discretion of the court, to give leave to compound upon such terms as they shall think proper, under the circumstances of the case. (1 *Wils.* 79. 5 *Term Rep.* 258.) And it seems to be a general rule of the court of *K. B.* when they give leave to compound a penal action, to require the king's half of the composition to be paid. (*Burr.* 1929.) This is a very salutary rule, and well calculated to prevent speculations on penal statutes; and we shall be disposed, hereafter, to adopt the principle of this rule, unless some special circumstances shall appear to prevent its application. In the present case, however, leave is given to discontinue, on payment of costs only, without exacting the moiety of the penalty to which, by the statute, the overseers of the poor of the town where the offence was committed, would be entitled.

Rule granted.

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such terms as they think fit; and it is a general rule, in the exercise of this discretion to require, as one of the terms of granting leave

(a) 2 *R. S.* 481, s. 6.

to compound. the moiety of the penalty given to the people to be paid, unless under special circumstances, when leave to discontinue on payment of the costs only will be granted. (a)

(a) *Acc. Caswell v. Allen*, 16 *Johns. Rep.* 118. *Minton v. Woodworth*, 11 *John. Rep.* 474. But payment to the plaintiff will discharge the defendant, though a discharge without payment is no bar to an action against the sheriff for an escape. *Id.*

*STARR AND RICE *against* VANDERHEYDEN.

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STARR *against* THE SAME.

MOTIONS were made in behalf of the defendant, for relief against the judgments entered up by confession, on bonds and warrants of attorney in the above causes, and several others against the same defendant. The affidavits were numerous, and the grounds of relief suggested, various and special. It is necessary only to state, in regard to one point decided, and in order to show how far the court interferes to prevent any oppression on the part of attorneys, that in the above two causes, the plaintiffs were attorneys, and the defendant their client, and part of the demands for which the judgments were entered was for their costs.

Mitchell, for the defendant.

Russell and *Starr*, contra.

Per Curiam. The court, from general principles of policy

The court, from general principles of equity and policy, will always look into the dealings between attorneys and their clients, and guard the latter from any undue consequences resulting from a situation in which they may stand unequal.

And where a judgment was entered by an attorney on a

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*bond and warrant by confession, against his client, and part of the sum for which the judgment was given, included costs, the court directed the clerk to inquire into the consideration of the bond, and to require the attorney to adduce proof of the consideration, or answer to interrogatories on oath; and the costs [* 254] included in the bond to be taxed, and to make report thereon to the court, and in the mean time, all proceedings on the judgment to be stayed.*

and equity, will always look into the dealings between attorney and client, and guard the latter from any undue consequences resulting from a situation in which he may be supposed to stand unequal. The court acknowledge the justness and application of the doctrine laid down by Lord *Loughborough*, in *Newman v. Payne*. (2 *Vesey*, jun. 199.) The judgment obtained by an attorney from his client by confession, must only stand as a security, for what is actually due. In order to enforce this principle, without intending any censure upon the attorneys in this case, the court direct the following rule:

“That it be referred to the clerk of this court, to inquire into the consideration of the bond on which judgment has been entered on warrant of attorney; and that the plaintiff, on such inquiry, shall adduce proof of the consideration of the notes attached to the bonds, and for what causes, and under what circumstances, the notes were given and executed by the defendant, or answer himself to such interrogatories as shall be exhibited. It is further ordered, that it be referred to the clerk, to tax the plaintiffs’ bill of costs in the said causes, to secure the payment *of which the bond and warrant of attorney on which the said judgment was entered, were given; and that the clerk give notice to the parties of the time and place of his proceedings under these orders, and that he report thereon to this court, and that in the mean time all further proceedings therein be stayed.”

WAIT against DURAND.

In an action against a justice for an act done in his official capacity, the defendant pleaded the general issue and a justification, and there was a replication to the second plea, and a demurrer, on which a judgment was given for the defendant.

On the general issue, a judgment of *nonpros* was obtained for not proceeding to trial; it was held, that the defendant was entitled to *double costs* on the *nonpros*, but not on the *demurrer*. (a) And after double costs had been taxed on both issues, and part of the costs paid, and an execution issued for the residue, the court ordered a retaxation of the costs, at the expense of the plaintiff.

THIS was an action of assault and battery, and for false imprisonment, brought against the defendant, as a justice of the peace, for an act done by him, in that capacity. The defendant pleaded, 1. Not guilty; 2. A special justification. On the issue on the first plea, the plaintiff was nonsuited, for not bringing the cause to trial, according to the practice of the court; to the second plea, there was a replication, *demurrer* and joinder, on which judgment was given for the defendant. In August, 1811, *double costs* were taxed, both on the judgment of *nonpros* and on the *demurrer*. Part of the costs were paid by the plaintiff in December, 1811. In February last, an execution was issued for the residue, on which proceedings were stayed by a judge’s order.

A motion was made to set aside the execution.

Per Curiam. The case of a judgment for the defendant, on demurrer, is not within the act giving *double costs*. (*Stone v. Woods*, 5 *Johns. Rep.* 182.) The plaintiff, therefore, was entitled to single costs only on the judgment on demurrer;

but not on the *demurrer*. (a) And after double costs had been taxed on both issues, and part of the costs paid, and an execution issued for the residue, the court ordered a retaxation of the costs, at the expense of the plaintiff.

(a) Acc. *Gibbs v. Bull*, 20 *Johns. Rep.* 212. Vide *Shaw v. Raymond*, 2 *Conn.* 512.

but he was entitled to double costs on the issue of fact, and the judgment of *nonpros* thereon. The costs ought to have been so taxed; and it is not too late to have that error corrected. We, accordingly, order a retaxation of the costs, with a stay of the execution in the mean time; and that the balance of the sum due on such retaxation, and no more, be collected on the execution. The costs of retaxation must be paid by the plaintiff; and neither party recover costs on this application.

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v.
DYER.

*MORGAN AND SMITH *against* DYER.

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PARKER, for the defendant, moved to set aside all the proceedings in this cause, since *October* term last, on the ground of irregularity, with costs, and that the plaintiffs reply to the plea of *puis darrein continuance*, &c.

It appeared, that the defendant's attorney received a declaration in the cause, on the 9th of *August*, 1811, in debt, on a judgment, to which he pleaded *nul tiel record*, &c. A replication was received on the 9th of *September*, and the cause noticed for trial, by record, in *October* term, 1811. On the 9th of *December*, a plea *puis darrein continuance*, verified by affidavit, setting forth the discharge of the defendant under the insolvent act, dated the 24th of *September*, 1811, was sent by the defendant, and served on the plaintiff's attorney the 1st of *January*, 1812. The plaintiffs, without taking notice of the last plea, noticed the cause for trial, by record, in *January* term last. The notice for trial was for the first *Monday* of *January*, and was received on the 28th of *December*, by the agent of the defendant's attorney, who lived one hundred and fifty miles from *Albany*. Notice of taxing costs was received in *July* last, which was the first notice the defendant's attorney had of the plaintiffs' having proceeded under the issue.

Russell, contra, contended, that a term having intervened between the time of the discharge and the delivery of the plea *puis darrein continuance*, it was a nullity, and might be treated as such. He cited 3 *Bl. Com.* 37. 7 *Johns. Rep.* 195.

Parker cited 2 *Caines' Rep.* 380. 3 *Caines' Rep.* 172. 2 *Johns. Rep.* 294.

Per Curiam. The defendant is not too late in the application. Though the notice of trial was served on his agent, on the 28th of *December*, yet, as the plea *puis darrein continuance* had not then *been served, and was soon after served on the plaintiffs' attorney, he had good reason to conclude that the plaintiffs would not proceed under their notice of trial, and especially, as his last plea (presuming it to have been well pleaded) was a waiver of his former plea in bar. The first notice he afterwards had of the plaintiffs' having proceeded, in *January* term, to trial, upon the issue of *nul tiel record*, was in *July* last. Under these circumstances, the defendant is still entitled to be heard upon the merits of his motion.

In an action of debt on a judgment, the defendant pleaded *nul tiel record*, on which issue was joined, 9th *September*, 1811, and the cause noticed for trial for *October* term following, but not tried. On the 9th *December*, the defendant pleaded *puis darrein continuance*, his discharge under the insolvent act dated the 24th *September*, 1811, which plea was verified by affidavit, and a copy served on the plaintiffs' attorney, on the 1st of *January*, 1812. The plaintiffs' attorney, on the 28th *December*, 1811, served a notice for trial, by record, on the agent of the defendant's attorney, residing 150 miles from *Albany*, and in *January* term,

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obtained judgment, and in *July* following gave notice of taxing costs to the defendant's attorney, which was the first notice he had of the plaintiffs' attorney having

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proceeded on
the issue.

It was held that the defendant was not too late, in August term, to apply to set aside the judgment; that the plaintiffs' attorney had no right to treat the plea *puis darrein continuance* as a nullity; but should have demurred to, or taken issue on, the plea, or have applied to the court to set it aside, as not pleaded in season. Though more than one continuance has intervened, the court will allow a defendant to plead his discharge *nunc pro tunc*, on payment of costs. (a)

The plaintiffs were not warranted in treating the plea as a nullity. Though the discharge bore date in *September*, it might not have been actually executed: or, if executed, it might not have been delivered to the party, until after *October* term. The plea was duly verified by affidavit, and the defendant was entitled to have the goodness of the plea, both as to form and substance, referred to the judgment of the court. If the plaintiffs did not choose to demur, or take issue on the plea, the least they could have done would have been to have applied to the court, on notice, to set it aside, as was done in the cases of *Paris v. Salkeld*, (2 *Wils.* 137,) and of *Martin v. Wyvill*. (1 *Str.* 493.) In the latter case the motion was grounded on the very allegation that the plea was not pleaded since the last continuance, but after the lapse of two continuances. The decision of the court turned upon another point, but this case shows the practice; and if that course had been pursued, the defendant might very possibly have shown that the matter had arisen since the last continuance. But if not, and if in fact another continuance had intervened between a certificate of bankruptcy and the plea of it, as a plea, *puis darrein continuance*, the courts in *England*, and here, have permitted the defendant to plead it *nunc pro tunc*, on payment of costs. (1 *Chitty's Plead.* 637. 2 *Johns. Rep.* 294.)

The defendant is, accordingly, entitled to his motion, except as to the costs of the application, which, under the particular circumstances of the case, are denied to either party as against the other.

Rule granted.

(a) Vide *Banker v. Ash*, *supra*, §50. *Morgan v. Dyer*, 10 *Johns. Rep.* 161. When a defendant has no opportunity to plead his discharge, under the insolvent act *puis darrein continuance*, he will be relieved on motion. *Palmer v. Hutchins*, 1 *Cowen*, 42.

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*WOOD, *ex dem.* L. ELMENDORF, against E. W. WOOD.

Where the lessor of the plaintiff, in an action of ejectment, went, as for a vacant possession, and obtained a regular judgment by default, it was set aside, and the person claiming to be owner of the land, on an affidavit of merits, &c. was admitted as defendant, on payment of costs, &c.

A MOTION was made that the judgment, default and writ of possession in this cause be set aside, for irregularity, &c. and that a writ of restitution issue, and that *Robert R. Livingston* be made defendant instead of the present defendant.

The affidavit of *Livingston* stated, that he was proprietor of a tract of land, in the *Hardenbergh* patent, including the premises in question; that *Jeremiah Gale* was placed on the land, as his general agent and superintendent, and had a lease for part. He also stated, that he and those under whom he claimed, had been in possession of the land for near eighty years, and that in 1790, or 1794, the tract was surveyed and run out into lots; that the lessor claimed under the trustees of the town of *Rochester*, &c. that the suit was commenced and carried on as for a *vacant possession*; and that he (*R. R. L.*) had a good and substantial defence on the merits, in the cause, if he could be made defendant; and that he had supposed, from the information of his attorney, that he had been made, with the consent of the lessor, a defendant, until since last

January term, when he was informed that the plaintiff had obtained a judgment, on which a writ of *hab. fac. poss.* had been issued, and the lessor put into possession of part of the land.

It appeared by two other affidavits, that since the last *Sullivan* circuit, the lessor expressed a desire to have the matter brought to a settlement between *Livingston* and himself, and promised not to proceed in the suit without giving the attorney of *Livingston* notice, and that *Livingston* might be made defendant, so as to have his title tried at the next circuit. The lessor also wrote a letter to *Livingston*, dated the 19th of *August*, 1811, informing him that he had commenced this action, and that he was willing to have the controversy amicably adjusted, and would meet him at any time or place that he would appoint for that purpose.

The affidavit of the lessor stated, that in order to obtain a notorious and evident possession of the premises, in connection with his constructive possession, under his deed from the trustees of *Rochester*, and to bring the claim of *Livingston* to a decision, he entered, in *August* last, on the premises, then vacant, and executed a lease to *William Wood*, of the premises, and delivered him the actual possession, who was, afterwards, on the same day, dispossessed *by *E. W. Wood*, upon whom, while actually in possession, a declaration in ejectment was served in the suit in which *William Wood* was plaintiff, and the said *E. W. Wood* the casual ejector; that on filing an affidavit of the lease, the ouster, and a service of the declaration, the rule to plead was entered, and the service of the new declaration and rule to plead, was admitted by *E. W. Wood*, the defendant, on the 10th of *August* last, on which admission, endorsed on the copy of the declaration, &c. and filing the same, the default of the casual ejector was, afterwards, entered, and, in *October* term last, a rule for judgment on the default was entered, which was perfected on the 24th of *October*. The rule for pleading expired on the 30th of *August*, and the last *Sullivan* circuit commenced on the 16th of *September*. Since the judgment, the lessor told the agent of *Livingston*, that he was willing to put the controversy at issue immediately, so that *Livingston* should be the lessor, and he the defendant, or to leave the matter to referees; but he denied that he had ever promised to stay the proceedings in this cause, or to relinquish the judgment, unless on terms, which were not acceded to by the attorney or agent of *Livingston*.

Per Curiam. The premises were vacant, so that there was no person in possession on whom a declaration in ejectment could be served, and the proceeding, in such case, was regular. But agreeably to our former decisions, in cases of ejectment, the default, judgment, and execution must be set aside, and *R. R. Livingston* be admitted as defendant, on payment of costs, and stipulating to admit he was in possession at the commencement of the suit.

Rule granted. (a)

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(a) See *Saltonstall v. White*, (1 John. Ca. 221.) *Jackson v. Stiles*, (1 Caines' Rep. 550.) *Jackson v. Stiles*, (4 John. Rep. 489.) *Davenport v. Ferris*, (6 John. Rep. 131.) 1 Caines' Rep. 155.

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v.
TURNER.

The venue in a suit by *scire facias*, on a judgment, must be laid in the county in which the venue was laid in the original action. (a)

*M'GILL against PERRIGO AND OTHERS.

INGALLS, for the defendants, moved to change the venue in this cause, which was a *scire facias* on a judgment, from Albany to Washington county, where the venue in the original action was laid.

Wendell, contra.

Per Curiam. A *scire facias* to revive a judgment is a continuation of a former suit; and the venue ought to be laid in the county in which it was laid in the original action. The English practice is decisive. (*Chitty's Plead.* 272. *Tidd's Prac.* 1035. *Hob.* 4. *Yelv.* 218. *Cro. Jac.* 231.)

Rule granted.

(a) But in debt on judgment the venue may be laid in any court in the state, without regard to the place of filing the record, or the venue in the original cause. *Goodrich v. Colwin*, 6 Cowen, 397. Contra, *Barnes v. Kemper*, 2 Johns. Cas. 381.

NOBLE against JOHNSON.

The validity of a certificate of discharge, under the insolvent act, will not be tried by affidavit, on motion for the insolvent's discharge from custody; but the plaintiff must resort to his action. (a)

H. BLEECKER, for the defendant, moved for the discharge of the defendant, who was in custody, having been surrendered by his bail, but had since obtained a certificate of discharge under the insolvent act.

Paine, contra, objected that the certificate of discharge was obtained by fraud, and offered affidavits.

Per Curiam. We will not try the validity of a discharge under the insolvent act, by affidavits. It was so decided, on several similar applications, at the last term. The plaintiff must resort to his action.

Rule granted.

(a) Vide *Baker v. Taylor*, 1 Cowen, 165.

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*GARDNER against TURNER.

A challenge lies to the array, for any partiality or default in the clerk, in selecting and arraying a jury.

Where a challenge to the array was made because the clerk drew seventy-two names out of the box and put them in a list, and then designated thirty-six names so drawn, to be a panel for the circuit, and the other thirty-six a panel for the Court of Com-

A MOTION was made in behalf of the defendant, for judgment as in case of nonsuit, for not proceeding to trial in this cause, at the last circuit in *Rensselaer* county.

It appeared that after the cause had been twice passed in the calendar of causes without being brought on, it was again called, and the jury were about to be empannelled, when the plaintiff's attorney presented a challenge to the array, which stated that the clerk of the county, his deputy or agent, instead of drawing out of the box, containing the names of jurors, thirty-six names, drew out the number of seventy-two names, which he put in a list, and then selected and marked thirty-six of the jurors, so drawn, and directed the sheriff of the county to summon the thirty-six jurors, whose names were so marked and designated, for the Circuit Court and *Oyer and Terminer*, and the others for the Court of Common Pleas, and the sheriff accordingly summoned the thirty-six jurors so designated, for the circuit.

The attorney for the defendant stated to the judge, that the facts alleged in the challenge were untrue, and offered to take issue, if the judge thought the challenge ought to be received, or sufficient to prevent the trial of the cause. The judge refused to quash the *venire*, or pass the cause, on account of the challenge, and no issue in fact was taken thereon. The plaintiff's attorney then declined to bring on the cause.

In support of the motion, the affidavits, also, of the clerk and his deputy were read, denying the facts stated in the challenge to the array made by the plaintiff's attorney.

R. M. Livingston, for the defendant.

Starr, contra.

Per Curiam. The defendant moves for judgment as in case of a nonsuit for plaintiff's default, in not proceeding to trial at the last circuit court, in *Rensselaer* county, and he is entitled to the effect of his motion, if the plaintiff has been in default. The motion is resisted on the ground that, at the circuit, the plaintiff *challenged the array, for a supposed misconduct in the clerk, in drawing out seventy-two names, and designating thirty-six of them to be summoned as jurors to that circuit. This challenge was overruled by the judge, but the plaintiff declined to proceed to trial.

Either party has a right to challenge the array; and partiality, or some default in the sheriff or his under officer who arrayed the panel, are good causes of challenge. (2 *Tidd*, 779.) If the facts alleged in the challenge are denied to be true, two triors are appointed by the court, out of the panel, (*Co. Litt.* 158,) or, perhaps, any two individual persons named by the court. If the triors pronounce the cause of challenge unfounded, the trial proceeds. If the facts are admitted, but are deemed insufficient, the court adjudges on them, and either quashes the array, or overrules the challenge. Since our statute authorizing the clerk to array the jury, a challenge lies to it, for partiality, or default in the clerk, who, for many purposes, is substituted for the sheriff, in selecting and arraying the jury. The facts set forth in the challenge amounted, if true, to a default in the clerk, in forming the array, and the defendant ought to have joined issue on the challenge; and if the triors had found, that the jury was not thus arrayed, then the cause must have proceeded, or the plaintiff would have been in default. The challenge should not have been overruled, and as it is, the plaintiff is not chargeable with a default in not proceeding to trial, for he had a right to the challenge, and, if well founded, it would be a sufficient cause for not going to trial.

It is now admitted that the facts stated in the challenge are unfounded; and could we believe that it was interposed merely to delay and interrupt the defendant, we ought, now, perhaps,

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mon Pleas, and the defendant denied the truth of the fact, and offered to join issue thereon, but the judge refused to quash the *venire*, or pass the cause, and no issue was joined on the challenge; and the plaintiff, under these circumstances, re-

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fused to bring on the cause to trial; it was held, that the cause alleged for the challenge was sufficient, and that the judge ought not to have overruled it, but should have appointed triors, to try the truth of the facts; and that the defendant was not, therefore, entitled to judgment as in case of nonsuit, because the plaintiff did not proceed to trial. (a)

(a) *Acc. Pringle v. Huse*, 1 *Cowen*, 432. So where a cause was regularly tried, and the jury discharged because they could not agree, and the judge allowed the cause to be again put on the calendar, for the purpose of being tried by another jury, it was held that the plaintiff was not bound to have the cause tried again at the same sittings, and that the defendant was not entitled to judgment as in case of nonsuit for not bringing it to trial. *Fisher v. Dale*, 17 *Johns. Rep.* 342. It is no cause of challenge to the array that two sets of jurors are drawn at the same time from the jury box, for two distinct courts, if they are kept entirely separate and a distinct panel of each is given to the sheriff. *Crane v. Dygert*, 4 *Wendell*, 675. 221

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to consider it as no excuse for not proceeding; this we are not authorized to do, but are bound to consider it interposed on information then received. Motion denied.

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***THOMPSON against SHEPHERD, JUN.**
SAME against SAME.
SAME against SAME.

Separate suits were bro't by the same person against the maker of several promissory notes payable to the same person, who endorsed them to the plaintiff. The notes were dated on different days, for different sums, and payable at different times; but were all due when the suits were commenced, and the writs were issued and served at the same time, on the defendant. It was held, that the suits could not be consolidated; but it seems that where separate suits are bro't on notes and contracts, made by the same person, at the same time, and where the defence is or must be the same in all, the court will order them to be consolidated. (a)

THESE were three separate actions, on several promissory notes, brought by the endorsee against the maker. The notes were dated on different days, for different sums, and payable at different times, to the same person, who endorsed them to the plaintiff. The notes were all due when the suits were commenced; and the writs were all issued at the same time, and served at the same time, on the defendant.

Z. R. Shepherd, for the defendant, moved to consolidate the suits.

Crary, contra.

Per Curiam. The motion for a rule that these causes be consolidated, must be denied. The notes are of different dates, for different sums, and payable at different times; and, for any thing that appears, different defences may be set up in the several suits. To compel a consolidation, under such circumstances, would be going farther than is the usual practice of this court or the K. B. in *England*; (1 *Caines' Rep.* 114. *Imp. K. B. Prac.* 668. 1 *Tidd*, 556;) though the case of *Cecil v. Briggs* (2 *Term. Rep.* 639) would seem to extend the consolidation rule to all actions between the same parties, and brought at the same time, where the causes of action might be comprised in the same declaration. A liberal extension of this rule is well calculated to prevent oppression, by an unnecessary accumulation of costs, and we should be inclined to say, that where separate suits are brought upon notes or contracts made at the same time, and which might have been united in one action, and when the defence is the same in all, a consolidation rule ought to be granted. Rule refused.

(a) Vide 2 *R. S.* 383, s. 36. A consolidation rule will be granted where several suits are pending between the same parties, brought at the same time, the causes of action in which may be comprised in the same declaration. *Brewster v. Stewart*, 3 *Wend.* 441.

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***CODWISE against FIELD.**

Where a *ca. sa.* against a sheriff was delivered to a coroner, who, being indebted to the sheriff, gave him a re-

A MOTION was made to set aside the *ca. sa.* issued to the sheriff of *New-York* in this cause, and all subsequent proceedings, and that the sheriff pay the amount of the money levied on the *ca. sa.* to the defendant.

From the affidavits which were read, it appeared that a *ca. sa.* issued against the defendant who was sheriff of *Dutchess*

county, at the suit of the plaintiff, directed to the *coroner*, who, on the 3d *April*, 1811, gave to the sheriff a receipt in full, of the debt and costs on the *ca. sa.* No money was actually paid by the sheriff, but the coroner being indebted to him for the amount, for money previously lent, it was agreed by the *coroner* that the receipt should be considered as payment of so much; and that the *coroner* should take upon himself to pay the amount of the *ca. sa.* to the plaintiff.

In *November*, 1811, the defendant was arrested in the city of *New-York*, on another *ca. sa.* at the suit of the plaintiff, for the same debt; and on paying the amount into the hands of the sheriff of the city of *New-York*, was discharged by order of the recorder, who directed the sheriff to retain the money in his hands until the next term of this court.

The *coroner* paid no part of the debt to the plaintiff; but in *December*, 1811, obtained his discharge under the insolvent act passed the 3d *April*, 1811.

The motion of the defendant made at the last term was, by consent, postponed for the decision of the court at this term.

Drake, for the defendant.

Codwise, contra.

Per Curiam. There was no payment or satisfaction of the first execution. Admitting that the coroner was authorized to receive the debt in money, as we think he was; yet it must be an actual and absolute payment in cash to him for the plaintiff. The motion must be denied.

Motion denied.

(a) If the sheriff take a promissory note in satisfaction of a *ca. sa.* and discharge the defendant without authority from the plaintiff, the latter may take a new execution or sue the sheriff for an escape. *Armstrong v. Garrow*, 6 Cowen, 465. And see *Bank of Orange County v. Wakeman*, 1 Cowen, 46. *Mumford v. Armstrong*, 4 Cowen, 553. *Dubois v. Dubois*, 2 Wendell, 416.

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ceipt in full for the debt and costs on the *ca. sa.* and engaged to settle the amount with the plaintiff, but failed to do so; it was held, that admitting the coroner was authorized to receive the debt in money, on the *ca. sa.* yet it must be an actual and absolute payment of so much cash to him, for the plaintiff; and that the agreement between the sheriff and coroner, was no payment or satisfaction of the debt. (a)

*BEERS against ROOT.

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THIS was an action of *slander* brought against the defendant, for saying that the plaintiff had passed counterfeit bank notes. There were several counts in the declaration. The defendant pleaded *not guilty*, with notice of a *justification*. The cause was tried at the *Delaware* circuit in *June*, 1812, before Mr. Justice *Van Ness*. The jury found a verdict for the plaintiff. A motion is now made to set aside the verdict, and for a new trial, on the ground of newly discovered evidence. The affidavit of the defendant stated, that since the trial of the cause, he had discovered new evidence, which was unknown to him at the time of the trial; the nature of which evidence was set forth in the affidavit.

Foot, for the defendant.

Sherwood, contra.

Per Curiam. The law will not allow a new trial to the defendant, merely to afford him an opportunity to prove the plaintiff a *felon*. Such an indulgence would not have been granted to the *people*, if the party so charged had been once

In an action of *slander* for charging the defendant with passing counterfeit bank notes, after a verdict for the plaintiff, a new trial will not be granted to the defendant, on an affidavit of newly discovered evidence, which went merely in support of a plea of *justification*. *Aliter*, if the new evidence goes only to the plea of *not guilty*.

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tried and acquitted. If the defendant had discovered new evidence which went to the plea of *not guilty* and that only, it would have altered the case; but we cannot permit him to fish for further evidence to support his plea of a justification of such a charge. The motion must be denied. Motion denied.

BLACK *against* BROWN.

A judge in vacation may enlarge the time for making a case. (a)

THE court said, that the time allowed by the sixth rule of *January* term, for making a case, might be enlarged by the order of a judge in vacation. The practice in that respect, had been altered since the decision in *Jackson*, ex dem. *Low*, v. *Hornbeck*, (2 *Johns. Cas.* 115,) which must now be considered as overruled.

(a) An order for time to make a case under the sixth general rule of *January* term, 1799, cannot be enlarged after the order has expired, but only while it is running. If it expire, relief can be had by motion only, for the purpose of which a judge may give an order to stay proceedings. *Hawkins v. Dutchess & Orange Steam Boat Co.*, 467.

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*WHITBECK, WIDOW, *against* SHOEFELT.

In real action, a special imparlance saves the rights of the party. After a special imparlance the tenant may vouch to warranty, &c.

THIS was an action of *dower*.

E. Williams, in behalf of the tenant, prayed leave to vouch *Samuel H. Gardenier*, of, &c. to appear, on the first day of next term, to *warranty*, &c.

Van Buren, contra, objected, that there had been a special imparlance entered at the last *October* term; and that the *voucher* ought to have been made at that term, and before the special imparlance.

Williams said, a special imparlance saved all the rights of the party.

Per Curiam. Take your motion. Motion granted.

JACKSON, ex dem. BANYAR AND OTHERS, *against* WILSON.

Where a verdict is set aside, and a new trial granted, a copy of the rule must be served on the plaintiff's attorney, before the defendant can move for a nonsuit, for not proceeding to trial. (a)

FOOT, for the defendant, moved for judgment as in case of nonsuit, for not bringing the cause to trial, &c.

The cause had been once tried, and a verdict found for the plaintiff, which was set aside by the court, at the last term, and a new trial granted. The plaintiff neglected to bring the cause to trial at the last circuit. It appeared that no copy or notice of the rule to set aside the verdict and for a new trial, had been served on the plaintiff's attorney; and

Mitchell, for the plaintiff, contended that, according to the *English* practice, service of a copy of the rule for a new trial

(a) But where a new trial is granted on the plaintiff's motion, he must proceed to trial without notice from the defendant. Otherwise he may be nonsuited. *Jackson v. Johnson*, 7 *Cowen*, 419.

was necessary, before the plaintiff could be considered in default.

Per Curiam. The *English* practice, in this respect, is proper and correct. And it is to be understood, as the practice of this court, that a copy of the rule for a new trial must be served on the plaintiff's attorney before he can be in default, or the defendant can move for a nonsuit.

Motion denied.

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***WEBB against CLEVELAND, ONE OF THE ATTORNEYS, &c.**

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HENRY, for the defendant, moved that a *procedendo* be awarded in this cause, which had been removed from the Court of Common Pleas, by a writ of *habeas corpus cum causa*. From the return to the writ, it appeared that the defendant was proceeded against in the court below, as an attorney of the court, and was not arrested, or held to bail.

Henry contended that the defendant, being privileged from arrest, could not be considered as in custody, and could not, therefore, be removed by *habeas corpus*; that the writ of *habeas corpus cum causa* removed the cause only when the body was removed. The proper remedy, in such a case, was to remove the proceedings by *certiorari*. 1 *Tidd*, 335.

Foot, contra.

Per Curiam. Take your rule for a *procedendo*.

Rule granted.

Where an attorney is sued in an inferior court, in which he is privileged from arrest, the cause cannot be removed into this court by a *habeas corpus cum causa*.

CARDALL against WILCOX.

RUSSELL moved for a commission to examine a captain in the *United States* army, now at *Greenbush*, on an affidavit stating that he was a material witness in this cause, and was expected soon to be ordered away.

Allen, contra.

Per Curiam. Take your rule.

Rule granted.

A commission will be granted to examine an officer in the army of the *United States*, on an affidavit of his being a material witness, and expected to be ordered away.

END OF AUGUST TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN OCTOBER TERM, 1812, IN THE THIRTY-SEVENTH YEAR OF
OUR INDEPENDENCE.

JACKSON, *ex dem.* LIVINGSTON AND WILSEY, *against*
WILSEY AND ANOTHER.

A. gave a lease of a farm, described by certain metes and bounds, to contain seventy-five acres. In an action of ejectment bro't by A. against B. to recover a parcel of land beyond the quantity of 75 acres, and which the lessee claimed to hold as within the boundaries set forth in the lease, it was held, that as A. had received rent for the farm from B. he must be considered, at least, as a tenant from year to year of the premises, and therefore, entitled to a notice to quit. (a)

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(a) Vide *Jackson v. Niven*, 10 *Johns. Rep.* 335. A tenant at will is a tenant from year to year for the purpose of a notice to quit. Vide

THIS was an action of ejectment, brought to recover lands in the town of *Gallatin*, in the county of *Columbia*. The cause was tried at the *Columbia* circuit, in *December*, 1811, before Mr. Justice *Yates*. The defendants claimed the lands only which were formerly in possession of *William Simmon*, and disclaimed as to the residue of the land in their possession. They admitted that the premises in question were within that part of the manor of *Livingston*, which fell to the share of *John Livingston*, one of the lessors of the plaintiff. The plaintiff gave in evidence a lease from *Robert Livingston*, the ancestor of *John Livingston*, dated 23d of *March*, 1784, to *John Tice Wilsey*, one of the defendants, in which the premises demised were described as follows: "The farm whereon *William Simmon* now lives, bounded, as follows, south, by the county line, west, by the farm of *William Denious*, and east and north, by vacant lands of said manor, to contain seventy-five acres in the whole."

It appeared that the whole quantity of land in the possession of the defendants was one hundred fifty and one-fourth acres.

John Wigram, a witness for the plaintiff, testified that he laid down the seventy-five acres, for the defendants, on a map, in a regular parallelogram. He stated that he first made a survey of the same in *1792, and that the defendants were then in possession up to the line of *William Denious*, and extended easterly as far as the possession of *Denious*; and that running along the line of *Dutchess* to the land of *Denious*, thence along his line to the vacant land, would exclude the buildings.

The defendants proved that *Simmon* lived on the premises about eighteen years before the defendants came into posses-

sion, and that one *Miller* lived on the premises three years before *Simmon*. The witness obtained the possession from *Miller*, and sold it to one of the defendants. The possession of the witness extended to the *Dutchess* line, and along that line to the farm of *Denious*, and along his line to the vacant land at the road. The house and barn now stand near where the old buildings stood. The defendants held the same possession as the witness, except two pieces of land, one of about four acres, on the north-easterly side of the farm, and the other about ten acres, on the easterly side, which the defendants disclaimed.

The defendants then offered to prove by a witness, who was present when the lease from *Livingston* to *Wilsey* was made, that the parties intended that the lease should be for the whole farm as *Simmon* held it, but this evidence was objected to, and overruled by the judge.

It was proved that *Simmon* paid rent to *Livingston*, and that when *Wilsey* took the lease, he assumed to pay the back rent; that *Simmon* and the defendants had been in possession of the farm, as they now claimed it, for about forty-seven years. Several receipts for rent from *Livingston* to *Wilsey*, two of them dated in 1786, and 1797, were produced in evidence. It appeared that the defendants claimed the possession of *Simmon*, under the lease from *Livingston*.

The defendants contended that by a just construction of the lease, all the lands in the possession of *Simmon* were covered by the lease: and that if there was any doubt on the point, the long acquiescence of the parties was conclusive; but if the number of acres were held to control the boundaries given, and the residue of the land in possession of *Simmon*, beyond the seventy-five acres, not to be within the lease, yet the possession of the defendants, for twenty-seven years, claiming a life-estate, was a sufficient adverse possession to bar the plaintiff's recovery in this action: and that if the possession was held not to be adverse, but under the lessor of the plaintiff, then the defendants were entitled to a notice to quit, which had not been given in this case.

*The judge ruled that a notice to quit was not necessary, and charged the jury that the number of acres mentioned in the lease must control, as to its construction; that the possession of the defendants could not avail them further than as evidence of an acquiescence in their construction of the lease, and in that view he left it to the jury, who found a verdict for the plaintiff for all the land, except the seventy-five acres.

A motion was made for a new trial.

Van Buren, for the defendants, cited *Roberts v. Karr*, 1 *Taunt. Rep.* 495. 1 *Esp. Cas.* 460. 3 *Johns. Rep.* 269. 7 *Johns. Rep.* 238.

E. Williams, contra.

Per Curiam. Without noticing the question as to the construction of this lease, in relation to the boundaries of the demised premises, we think a new trial must be granted, on the

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*Philips v. Co-
rers*, 7 *Johns.
Rep.* 1. *Brad-
ley v. Covel*, 4
Cowen, 349.
*Nichols v. Wil-
liams*, 8 *Cow-
en*, 13. *Jack-
son v. Miller*, 7
Cowen, 747.
*Jackson v. Sal-
mon*, 4 *Wen-
dell*, 327.

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ground that the defendants were entitled to notice to quit. What was the rent reserved in this lease does not appear by the case. The receipts set forth, show the rent to have been paid for the farm occupied by the defendants, and, of course, paid for the premises in question. By this payment, and the acceptance of rent, the defendants became tenants from year to year; and, according to the settled rules of law, were entitled to notice to quit. It may be remarked that this rule, as to notice to quit seems highly just and reasonable, as it respects the rights of tenants, without essentially prejudicing the interest of landlords; and that the *English* courts have latterly been more liberal in the application of it, extending it even to tenants at will. (13 *East*, 210.)

Motion granted.

[* 270] *JACKSON, *ex dem.* VANBEUREN AND OTHERS, *against*
VOSBURGH.

A. died seized of lands, leaving three sons, B., C. & D. In an action of ejectment by the heirs of B. against E., who claimed to hold under D., E. offered in evidence the will of A. dated in 1757, by which he devised his real estate to his three sons and their heirs, in equal proportions; but it being objected that the will was void, on account of the insanity of the testator, E. waived the production of the will, and relied on a *parol partition* of the testator's estate, between the three sons, made in 1786, a previous holding by them, as tenants in common, and the separate possession, under the partition, of D. continued from that time. It was held, that

THIS was an action of ejectment, for a certain piece of land called *The Island*, in the town of *Kinderhook*, in the county of *Columbia*. The cause was tried before Mr. Justice *Yates*, at the *Columbia* circuit, in *November*, 1811.

The plaintiff proved that the premises in question formerly belonged to *Johannis Van Deursen*, the elder, who occupied them until his death, in 1757. *Robert*, his eldest son, died, leaving six children, *Peter*, *Stephen*, *Laurence*, *Cynthia*, *Mary*, formerly the wife of *John Vanbeuren*, and *Christiana*, who married *John Boyd*, both of whom died, leaving four sons, *Robert*, *William*, *John*, and *James*, who, with *Mary Vanbeuren*, are the lessors of the plaintiff. The three sons of *Johannis Van Deursen*, the elder, to wit, *Robert*, *Laurence*, and *John*, succeeded to the possession of their father's estate, of which *The Island* is a part, and which *John* afterwards occupied and improved alone.

The defendant produced the will of *Johannis Van Deursen*, dated the 11th *December*, 1757, by which he devised his real estate to his three sons, *Robert*, *Laurence*, and *John*, an undivided third part to each and to their heirs and assigns for ever. After his death, in 1757, his sons lived together in one house. After *John* married, the sons lived in separate rooms. *John* continued to live in the east room for several years, and then moved to the place where the defendant now lives, and continued to work on the old farm as usual. The sons built a mill after their father's death, which they attended alternately; but, after *John* married, they possessed the rest of the farm separately. *John* possessed the premises on the east side of the road, and *Robert* on the west side of the road.

Cornelius Van Alen, a witness for the plaintiff, testified that he knew the premises forty years ago, when they were possessed by the three brothers. The field west of the road was called the *back land. After *John* married, he possessed separately.

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Laurence and *Robert* did not divide, but took two-thirds, and *John* one-third. After the death of *Robert*, when all his children were present, one of them said to the witness, that they had settled with their uncle *John* and divided, and that *John* took *The Island*, and *Robert* and *Laurence* the land on the opposite side of the road, and over the creek; *John* had the south end of the *bush-land*, and the others the north end. *Eykebush* land was also divided, but how the witness could not recollect. This conversation took place in the presence of *Stephen* and *Laurence*, the sons of *Robert*, who claimed the share of their uncle *Laurence*.

Elizabeth Van Deursen, the widow of *John*, the brother of *Robert* and *Laurence*, testified, that before her marriage with *John*, which took place thirty years ago, the brothers lived together in the same house, and after her marriage, for about five years, *John* had the management of the farm, and *Robert* of the mills. The division was made in the life-time of *Robert* and *Laurence*, and before *John* left the house. *John* was to have one-third; and the land on the east side of the creek was laid down as one-third of the farm, and called the *New Bowery*. On the west the whole was laid down as two-thirds. *John* took one part, and *Robert* and *Laurence* the other parts. *Robert*, being the eldest, had his election, and he chose the north end of the *bush-land* and *John* the south. *Robert* took the place where Mr. *Vanbeuren* lives; and *John* on the opposite of the road, called *Collie's Crawl*. *Robert* took the back land, and *John* *The Island*, being the premises in question. *Robert* took the north end of the *Kinderhook-fly*, and *John* the south; and the same division was made of *Eykebush*. The brothers, before this partition, divided the grain. This partition took place in *May*, 1785, or 1786, and *John* moved to the place where the defendant now lives. *John* occupied the lands allotted to him by the division, separately, until his death. The old homestead was not divided. On her cross-examination, the witness testified, that this division took place between the brothers while standing in the door-yard. They first made offers to each other. *Robert* asked *John* if he would take the east side of the creek, and *John* returned the question; but neither agreed to accept it. They agreed that the east side of the creek should be set off, as one third of the *Kinderhook* estate, and that the lands on the west side should be divided into two parts, of which *John* should have one. *Laurence* then lived with *Robert*. *John* and **Laurence* came into the house, immediately after the division, and *John* stated the division, in the hearing of *Laurence*, who assented to it, as above-mentioned. *Laurence* said, "Now we know where our land is, and we shall hereafter work separately." *Robert* and *Laurence* took possession according to the division, and always lived separately from *John*. The division was agreed to in the door-yard; and the witness occasionally stopped at the door to hear the conversation.

Other witnesses confirmed the testimony of this witness, as to

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though when a tenancy in common is admitted, a parol partition, followed by possession under it, will be valid; yet, where the whole right or title of the party setting up the tenancy in common and parol partition is denied, a parol partition and possession under it, will not be sufficient to transfer the title; that by waiving the will of *A.* the title was to be considered in *B.*, as heir at law, and could not be divested by parol.

Though, after a possession by *D.* for so long a time, a tenancy in common might have been presumed; yet, by offering the will of *A.* and waiving it, the door was shut against the presumption of any other source of title. (a)

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(a) Vide *Jackson v. Moore*, 13 Johns. Rep. 513. *Jackson v. Christman*, 4 Wendell, 277. *Hepburn v. Auld*, 5 Cranch, 262.

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the separate possessions of the brothers, as long as they could remember, for twenty-four years, or more.

The defendant gave in evidence, an order of the judge of the Court of Probate, authorizing the administrators to sell the real estate of *John Van Deursen*, and the deed made in pursuance thereof to the defendant, dated the 24th *July*, 1801.

A deed was also produced in evidence from *John* and his wife, and the heirs of *Robert* and *Laurence*, to *Daniel Staats* and *Adam Van Alen*, for the mills, in which *John* warranted for one-third and the other grantees for two-thirds.

The plaintiff then offered to prove that *Johannis Van Deursen* the elder, was insane at the time of making his will; and that a year or two after the division spoken of by *Elizabeth Van Deursen*, *Robert* told *John* that he had no right under the will; and that *Staats* had made an application, long after the death of *Robert*, for a division of the lands on the east side of the creek; and offered also to show by parol, that he claimed by deed from *John Van Deursen*; but this evidence was objected to and overruled by the judge.

Cynthia Van Deursen, was called as a witness for the plaintiff. Her evidence was objected to, but admitted by the judge. She was the daughter of *Robert*, and remembered the trial at *Claverack*, and that *John* called on her brothers and sisters soon after, and said he had been to *Claverack*, and that he and *Staats* had tried to get the lands on the east side of the creek divided. He asked if they would take away the lands their father had given to them; that it had now been proved that the will was good for nothing, and void. He said nothing about any previous division, and asked if they would give him a conveyance, to which they agreed. This was a short time before *John* died, and at the time the deeds were executed. Whether *Mrs. Boyd* was then dead or not, the witness did not recollect. She was not then present. She died *before her husband. On her cross-examination, the witness said that *John* went into possession of *The Island* after his marriage. Before he moved, *Robert* and *Laurence* held together; *John* held possession separately, as stated by the other witnesses. Deeds were given to *John* according to the contract. *Laurence* died about twenty-five or twenty-six years ago, and from that time the possessions had been uninterrupted. The defendant purchased the back lot of the *Boys*. He owned *The Island* and *Collie's Crawl*.

The plaintiff again offered to prove the insanity of *Johannis Van Deursen* the elder, at the time of making the will, and to disprove the fact of acquiescence under it, to which the defendant's counsel objected. The judge decided that the defendant must either abandon the will altogether, and rely upon the division, or he should admit the evidence to impeach the validity of the will. The defendant's counsel then declared that they should rely upon the division merely.

The defendant produced two deeds, both dated the 18th *March*, 1797, one from *John Van Deursen* and wife to *Cynthia Van Deursen* and others; the other from *Cynthia Van Deur-*

sen and others to *John Van Deursen*; and it appeared that the defendant was counsel for the heirs of *Robert Van Deursen*, on the hearing of *Staats* for a partition, and then produced, pursuant to a notice for that purpose, the deed from *Cynthia Van Deursen* and others, the heirs of *Robert*, to *John*, and which contained a covenant of warranty against all persons claiming under *Robert* or *Laurence*.

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The judge charged the jury, that the plaintiff had, in the first instance, made out a clear right of recovery. That the defendant having elected to rely on the parol partition between the brothers, and not to claim under the will, the jury were not to be influenced by the will, further than its existence ought to be evidence of the probability of a division; that the only question for the jury to decide was, whether there had been a division made between the brothers; and if so, whether it was intended to be permanent, or whether for temporary purposes only; that if they believed that there had been no division made, or that it was for temporary purposes only, they ought to find for the plaintiff for two-sixths of the whole premises; otherwise, for the defendant.

The jury found a verdict for the plaintiff, for two-sixths of the premises.

A motion was made to set aside the verdict, and for a new trial.

**E. Williams*, for the defendant. The acts of possession proved, down to the year in which the division was made, were those of co-tenants, and are inconsistent with the idea that *Robert* claimed as sole heir to his father. The three sons of *Johannis* the elder, exercised joint acts of ownership. The deed shows that the mill, which was not divided, was held by them, as co-tenants, in common, and they warranted as tenants in common. This tenancy in common was confirmed, by the division which took place, more than twenty years ago, since which time the property has been held in severalty. Here is a possession by the three sons, as tenants in common, from the year 1757, until the division, and subsequently, in severalty, for a period of more than fifty years. A will from the ancestor is, therefore, to be presumed; or, if necessary, a grant from the ancestor to the three sons may be presumed, as *Robert*, the eldest son, acquiesced in the possession in common. (3 *Johns. Cas.* 295. 2 *Caines' Rep.* 383. 1 *Caines' Cases in Error*, 1—20.)

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A parol division of land, carried into effect, by possessions taken in severalty, according to the division, is valid, and sufficient to sever the tenancy in common. (*Jackson v. Harder*, 4 *Johns. Rep.* 202—212.)

The evidence is full and conclusive to the fact of a parol partition.

Though, at the trial, on account of the allegation of the insanity of the testator, the defendant, under the direction of the judge, abandoned the will, yet he did not, thereby, waive the presumption of law, arising from the facts in the case, of the existence of a will or grant.

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But whether there was a will, or not, is immaterial; since there was a partition made, to which *Robert* was a party, and to which he assented; for he is now estopped, by his own acts; from saying that there was not a tenancy in common. The defendant has shown a partition in fact, and possessions according to it, for near thirty years.

Again, if *John* did not hold as tenant in common, he held tortiously, and adversely to *Robert*, for more than twenty-six years; so that there was a descent cast which tolled the right of entry; an adverse possession sufficient to oust even a tenant in common. (*Smith, ex dem. Teller, v. Burtis and another*, 6 *Johns. Rep.* 197.)

Again, the evidence of *Cynthia Van Deursen* ought not to have been admitted to prove the admission of the defendant. Parol evidence of a disclaimer of title to real property is inadmissible. (*Jackson, ex dem. Van Alen and others, v. Vosburgh*, 7 *Johns Rep.* 186.)

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Van Buren and *Foot*, contra. The will of *Johannis Van Deursen* was wholly abandoned at the trial, and the cause was stripped *of all color of title. The only question was as to a parol partition. In order that a parol division should be valid, so as to conclude the rights of the parties, it must be a division of the land, or property, itself, and permanent, not a mere temporary separation of the possession, until a permanent division is made. Here was a valuable estate, said to be divided between three brothers, in an accidental conversation, at which no witness was present; the only evidence of it being the testimony of a person who, as she passed to and fro, casually heard the conversation between the parties. No doubt a parol partition may be proved by parol. So it may also be disproved by parol; and the plaintiff proved that *John* applied to the other heirs for a division long after the alleged partition.

The will being abandoned, what evidence was there of a tenancy in common? To render a parol partition valid, a title in common must be shown. The only question related to a parol partition. It was a question of fact, on which the jury have decided, and their verdict ought not to be disturbed. The other points, suggested by the defendant's counsel, were not made at the trial, and are not, therefore, now to be discussed.

The testimony of *Cynthia Van Deursen* does not come within the rule laid down in *Jackson, ex dem. Van Alen, v. Vosburgh*. Her evidence went merely to explain a doubtful fact. The confession of a party is the highest evidence against him; and though it cannot be admitted to transfer a title to land, yet it may be received to explain a doubt as to that title.

Again, after the party has produced a will, and then waived it as void and of no effect, the law will not presume a will; nor will the law presume a grant, when the party alleges that he holds under a will, not by grant.

Van Vechten, in reply, said, that the will was wholly abandoned; and if it is to be considered as out of the case for one

purpose, it must be so for every purpose. It cannot be used by the plaintiff to rebut the legal presumption of title arising from the long continued possession, and acquiescence of the parties. Such a possession acquiesced in for such a length of time, must be considered as grounded on title, the evidence of which is lost by lapse of time. The *mill*, which was a part of the estate of *Johannis* the elder, was sold by all the parties, and the heirs of *Robert* warranted *as to one third. If *Robert* was the heir at law of *Johannis*, he was heir to the whole estate; and how, then, do the heirs of *Robert* join in a deed for the mill, and warrant only as to one third? He dwelt on the facts in the case, to show an entire acquiescence by *Robert*, and his heirs, in the occupation in severalty by *John* as owner.

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Per Curiam. *Johannis Van Deursen*, deceased, is admitted to be the source of title, as claimed by both parties. His son *Robert*, under whom the lessors of the plaintiff derive title, was his heir at law; and the defendant claims under *John*, a younger son of *Johannis*. To establish his right, the defendant introduced the will of *Johannis*, and then went into proof to show that his three sons held and used the real estate, of which their father died seised, as tenants in common, until about the year 1786, when a parol partition was made between them, upon which the premises in question were allotted to *John*. On the part of the plaintiff, proof was offered to show that *Johannis Van Deursen* was incapable of making a will. This was objected to, but admitted by the judge, if the defendant relied upon the will to establish his title. Upon this the defendant elected to abandon the will, and rely upon the right derived under the parol partition. One of the grounds urged in support of the present motion is, that this will was improperly excluded. There certainly can be no pretence for setting aside the verdict on that ground. For, if the defendant set up this will as a part of his title, and meant to rely upon it to take away the right of the heir at law, it was surely competent for those claiming under the heir at law to show that the testator was incapable of making a will. The only question before the jury was respecting the parol division; and if this division was valid in law, it might be questionable, whether the verdict ought not to be set aside, as being against the weight of evidence. There is no doubt but that, where the *title* is admitted to have been in common, a parol partition, followed up by *possession*, will be valid, and sufficient to sever the *possession*. (4 *Johns. Rep.* 212.) But where the whole right and title of the party, setting up such tenancy in common, is denied, and in fact, abandoned, as in the present case, by laying out of view the will of *Johannis Van Deursen*, the parol partition will not operate as a transfer of title. The will having been abandoned, the title was in *Robert*, as heir at law, and that could not be divested by parol. The *possession in common was for such a length of time, that, perhaps, a title in common might have been presumed, had not the defendant shown the source from which he claimed to have derived it. But this source being the will of *Johannis Van Deursen*, and that having been

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abandoned, the door was shut against the presumption of any other title. No question as to adverse possession appears to have been submitted to the jury; and had there been, there is no ground to disturb the verdict on that account. The motion for a new trial must, accordingly, be denied. Motion denied.

J. RADCLIFF AND OTHERS *against* **THE UNITED INSURANCE COMPANY.**
SAME *against* **SAME.**

A policy of insurance contained a clause, that the insurers took no risk of blockaded ports. It was held, that if there was a blockade in fact, whether the capture on that account, was legal and just, or not, it came within the exception of the risks of a blockaded port. Where the sentence of condemnation is directly on the ground of a breach of a blockade *de facto*, it is *prima facie* evidence of the

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fact of such blockade; and it is not enough that the jury have doubts as to the existence of the blockade at the time of the capture, to authorize them to find a verdict for the plaintiff. (a) *St. Lucar* was, in fact, blockaded on the 27th January, 1808.

THESE were actions on two policies of insurance on the brig *William Tell*, and her cargo, dated sixth *December*, 1807, "at and from *New-York* to *St. Lucar*." On a former trial of this cause, a verdict was found for the plaintiffs, which was set aside, and a new trial granted, chiefly for the misdirection of the judge. (See 7 *Johns. Rep.* 38—57.)

The cause was again tried, at the sittings in *New-York*, on the 21st *December*, 1811, before Mr. Justice *Van Ness*. The evidence, on the second trial, was nearly the same as that given on the first. The additional evidence consisted of an explanatory deposition by *Thomas Holden*, the master of the brig; and by *Jabez Lovett*, master of the *Connecticut*. Two other witnesses were examined; *Joseph P. Manny*, on the part of the plaintiffs, and *Samuel Lyle*, on the part of the defendants.

Holden stated that by the words "the fleet off *Cadiz*, or before *Cadiz*," or similar words, used in his former deposition, he did not mean to describe the actual position of the fleet alluded to, but merely to designate the fleet itself, about which he was speaking. That when the lugger and the prizes joined the fleet, which was about forty-eight hours after the capture of the *William Tell*, the fleet *lay off *Cape Spartel*, but the reason of its being there he did not know. The weather, previous thereto, had been moderate and pleasant, and the wind very light. The lugger having placed the prize under the charge of the fleet, did not continue with it more than an hour and a half, but proceeded for *Gibraltar*. About thirty hours after leaving the fleet, the lugger encountered a considerable storm, which drove her on the *Barbary* coast, and obliged her to put into a port there to repair. He never heard of the blockade of *St. Lucar*. When the lugger, after the capture, joined the fleet, the witness could not see land, nor could he tell how far it was distant from *Cape Spartel*, nor how *Cadiz* bore from the fleet.

Jabez Lovett, master of the ship *Connecticut*, deposed, that shortly after he passed *Cape St. Mary's*, he was chased by two frigates; that they could not know, from the course he was steering, whether he was going to *Cadiz* or *St. Lucar*. After he

(a) The sentence of a foreign court of admiralty is only *prima facie* evidence of the facts on which the condemnation purports to have been founded, and in a collateral action such evidence may be rebutted by showing that no such facts did in reality exist. *Francis v. Ocean Ins. Co.* 6 *Cowen*, 404. *S. C. in error*, 2 *Wendell*, 64. The Court will not hear an argument to show that such a sentence is conclusive of the facts on which the foreign court proceeded. *New-York Fireman Ins. Co. v. De Wolf*, 2 *Cowen*, 56. For the other points discussed in *Radcliff v. United Ins. Co.* Vide 7 *Johns. Rep.* 38 et seq.

altered his course, to run into *St. Lucar*, the frigates endeavored to cut him off, and chased him, until he came to anchor, under the guns of the fort at *St. Lucar*; that when he arrived there, on the 4th of *February*, 1808, he understood *St. Lucar*, as well as *Cadiz*, was blockaded, and had been so for some time before; that he continued there two months, during which time, and when he left it, it was universally understood to be blockaded. The blockading squadron might be seen daily, and he saw it twice; that when he came out of *St. Lucar*, he saw twenty-four sail of the squadron; he escaped them in the night. The distance from *St. Lucar* to *Cadiz* is twenty-five miles by water, and fifteen miles by land. Cargoes landed at *St. Lucar* may be easily transported to *Cadiz* in boats along the shore. The squadron blockading *Cadiz*, would necessarily blockade *St. Lucar*, if it was intended to be blockaded. He undertook the voyage to *St. Lucar* on the information of his brother, *James Lovett*, at *St. Lucar*. Before he left *New-York*, he heard that *Cadiz* was blockaded, but not *St. Lucar*.

The letter of Mr. *Canning*, dated 8th *January*, 1808, which was read in evidence, stated, "that his majesty had adjudged it expedient to establish the most rigorous blockade at the entrances of the ports of *Carthagen*a, *Cadiz* and *St. Lucar*, and all the intermediate ports between *Carthagen*a and *St. Lucar*."

Richard Bayley, a witness for the defendants, testified, that he was at *Cadiz* from the last of *October*, 1807, to *March*, 1808; *that he understood, from the general report and understanding, when he arrived there, that *Cadiz* and *St. Lucar* were blockaded. The same fleet could blockade both ports, if that was intended. Vessels not having provisions were sometimes permitted to enter *Cadiz*; but vessels with provisions were turned away. Provisions were carried along shore from *St. Lucar* to *Cadiz*. He kept his cargo for a rising market, in consequence of daily hearing that both ports were blockaded. The cruising ground of the squadron, as he was informed, was from *Cape Spartel* to *Cape St. Mary's*. The blockade began to be more rigorous some time in *January*. Some new orders arrived at *Cadiz*, from *England*, in *January*, after which the blockade was more rigorously enforced. The usual passage for a despatch vessel from *Portsmouth* to *Gibraltar* was from eight to twelve days. He understood, at *Cadiz*, that it was the practice of the blockading squadron to keep small vessels off *Cape St. Mary's*; he saw only a gun brig when he entered, but was not hailed by her, though within a sufficient distance for that purpose.

Joseph P. Manny testified that he arrived at *Cadiz* about the 22d of *September*, and left it about the 22d of *November*, 1807, at which time *St. Lucar* was not considered in a state of blockade. He was warned by an *English* cruiser not to go to *Cadiz*, and was told he might go to any other port in *Spain*. He went to *Algesiras*, and transported his cargo, coastwise, to *Cadiz*. The distance between the two places is about one hundred and twenty miles. A good passage from *England* to *Cadiz* is fifteen days; it has been made in eight days, though it

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usually takes a longer time. . The usual passage would be twenty days. The same squadron would blockade both *Cadiz* and *St. Lucar*, if both were intended to be blockaded.

Samuel Lyle testified, that in a voyage from *New-York* to *Cadiz* and *Algesiras*, he was boarded, about the 20th *November*, 1807, between *Cape St. Vincent* and *Cape St. Mary's*, by an *English* gun brig, and warned not to go into *Cadiz* or *St. Lucar*, as they were blockaded; and, in consequence of this warning he went to *Algesiras*, where he understood that both *Cadiz* and *St. Lucar* were blockaded. He went by land from *Algesiras* to *Cadiz*, where he arrived between the 1st and the 10th of *February*, 1808, and where he also understood that *Cadiz* and *St. Lucar* were blockaded, and that the blockade was more rigorous in consequence of some new orders from *England*.

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A witness testified, that an ordinary passage from *Falmouth* to **Cadiz*, for a government packet, was from eight to twelve days. Twenty days would be a long passage in winter; fifteen days, at that season, would be a fair allowance.

Several witnesses testified, that when the *William Tell* left *New-York*, it was not known, or supposed, that *St. Lucar* was blockaded. The *William Tell* was captured in the regular track to *St. Lucar*.

The judge charged the jury, that if *St. Lucar* was blockaded in fact, and the *William Tell* had approached within the cruising ground of the blockading squadron, at the time of her capture, they ought to find for the defendants, whether the capturing vessel belonged to the squadron or not; but that if *St. Lucar* was not blockaded, and if the blockade, at the time of the capture, had been voluntarily raised, or suspended, or if the *William Tell* had not reached the cruising ground, they ought to find for the plaintiffs; that the mere blowing off of the blockading squadron, if they resumed their station with due diligence, would not be a raising or suspension of the blockade, in the mean time; that the defendants must bring themselves within the exception in the policy; and that if the proof was not satisfactory that *St. Lucar* was blockaded, on the 27th of *January*, 1808, or if the jury had doubts on that point, they ought to find for the plaintiffs.

The jury found a verdict for the plaintiffs; and being asked by the counsel of both parties, if they found for the plaintiffs on the ground that *St. Lucar* was not blockaded, they answered in the affirmative.

A motion was made, by the defendants, for a new trial; 1. Because the verdict was against evidence; 2. For the misdirection of the judge.

The cause was argued by

Hoffman and *Wells*, for the defendants.

P. W. Radcliff and *Van Vechten*, for the plaintiffs.

KENT, Ch. J. delivered the opinion of the court. The motion for a new trial is made upon two grounds; 1. That the verdict is against evidence; and, 2. That the judge misdirected the jury.

1. The first point is open for a free consideration, notwith-

standing a new trial has been once granted in this cause. The verdict was formerly set aside for misdirection. That was the main *ground of the opinion of the court, and the jury gave the first verdict in pursuance of the direction of the court on a point of law, and without giving themselves any time to deliberate upon the question of fact of the existence of the blockade. That question was, in this last trial, for the first time, submitted to the jury, and deliberately passed upon by them.

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The question is, whether *St. Lucar* was, at the time of the capture, a blockaded port, within the exception in the policy. This is a matter of fact, depending on a contract between our own citizens. It has nothing to do with any conflict between belligerent and neutral pretensions. It does not necessarily involve any examination into the just extent of these pretensions. It is a plain inquiry into the existence of a fact, viz. was here a loss chargeable to the existence of a blockade? A blockade may exist in fact, and yet a capture and condemnation for the breach of it be unjust, from the want of knowledge in the neutral of the existence of the blockade. This case, then, need not, and ought not, to awaken any prejudice, or bias, one way or the other, as respects the object of the present suit; and there are no considerations which ought to have induced a jury to require more strict evidence of this, than of any other ordinary question of fact.

The court have already decided that the legality of the capture was not the question in the case. Admitting the capture and condemnation to have been illegal, from the want of due proof of notice, yet, if the loss arose by reason of the port of *St. Lucar* being blockaded, it falls within the exception.

There may be a blockade of a port in fact, unaccompanied with a previous notification to neutral nations; and, therefore, a vessel arriving within the cruising ground of the blockading squadron, and bound to the blockaded port, in ignorance of the blockade, would in the first instance, be entitled, of right, to a notice to depart, and not subject to capture and condemnation; yet, if the latter alternative should be adopted by the belligerent, either from a disregard to right, or from an overstrained application of the doctrine of constructive notice, the loss would still be on account of the blockade. It would be to be classed among those *risks of a blockaded port* which the insurer did not, in the present instance assume. And in cases of blockade, attended with a general notification to neutrals, it does not necessarily follow that the blockade did not exist in fact, at or before the promulgation of the notice. It may exist *de facto*, at the date of the notice. There is nothing inconsistent or unusual in this. The notice to the neutral governments is given *to put their subjects and citizens upon their guard, and to fix, afterwards, with more facility and certainty, the *delictum* upon the neutral who is seized in the act of violating, or attempting to violate, the blockade. Thus for instance, the notification of the blockade of *Genoa* was announced by the *British* government on the 20th of *February*, 1801, as then existing, and that it had

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existed from the 5th of *January* preceding. (3 *Rob. Adm. App.* p. 44.) So in the case before us, it is to be inferred, from the letter of Mr. *Canning*, of the 8th of *January*, that the blockade of *St. Lucar*, and of the other ports referred to, was then actually existing. If the letter was to be considered as establishing the fact that *St. Lucar* was not then in a state of blockade, it would equally go to prove that *Cadiz* was not also, at that time, blockaded, though, from the plaintiffs' testimony, in this case, it appears that *Cadiz* was in a state of blockade for months before. The notice given by Mr. *Canning* referred to an extended line of the *Spanish* coast, embracing many ports besides *St. Lucar*; and it is by no means to be inferred from that notification, that no single port, within that line, was previously in a state of blockade.

The evidence of a blockade of *St. Lucar* existing *de facto*, at the time of the capture, consisted of the following items:

1. The sentence of condemnation, which proceeded directly on the ground of that fact; and this sentence is *prima facie*, though not conclusive, evidence of the fact of the blockade. This effect of the foreign sentence was conceded by the counsel, and the court, upon the final decision, in the Court of Errors, of the greatly litigated question touching the conclusiveness of foreign sentences. (2 *Johns. Cas.* 451.)

2. The affidavit of Captain *Jabez Lovett*, who was chased into *St. Lucar*, on the 4th of *February*, 1808, by two *British* frigates. When he arrived, he understood that *St. Lucar*, as well as *Cadiz*, was blockaded, "and had been so for some time before." And while he continued at *St. Lucar*, which was two months, it was universally understood to be blockaded, and the blockading squadron was to be seen almost daily.

3. The testimony of *Richard Bayley*, who was at *Cadiz* from *October*, 1807, to *March*, 1808. He says, that when he arrived, and while he continued there, he understood, from general report and understanding, that *Cadiz* and *St. Lucar* were both blockaded. *St. Lucar* is only fifteen miles from *Cadiz*, and he had no doubt of the fact from daily observation; and the same squadron would blockade both ports, if both were intended to be blockaded. The *cruising ground of the squadron was from *Cape Spartel* to *Cape St. Mary's*.

4. The testimony of *Samuel Lyle* states, that he was boarded by a *British* gun brig, between *Cape St. Vincent's* and *Cape St. Mary's*, between the 15th and 20th *November*, 1808, and warned not to go to *Cadiz* or *St. Lucar*, as both were blockaded; that he went to *Algesiras*, and there distinctly understood that both *Cadiz* and *St. Lucar* were blockaded; that he arrived by land at *Cadiz*, between the 1st and 10th of *February*, 1808, and there understood the same thing, and that the blockade was lately more rigorous, in consequence of new orders.

It is difficult to resist the force of this mass of direct and positive testimony, arising not only from the sentence of the vice-admiralty court, but from persons who acquired their information at the time, either by the act of warning of the belligerent

cruiser, or from their own observation, and the testimony of the *Spaniards* themselves, at the very places blockaded.

The testimony on the other side, to prove the non-existence of the blockade, consists of the following *items* :

1. The testimony of Captain *James Lovett*, who left *Cadiz* the last of *October*, 1807. He says that *St. Lucar* was not then considered as blockaded.

2. The testimony of *Joseph P. Manny*, who left it the 22d of *November*, and he says that *St. Lucar* was not then considered as blockaded.

3 and 4. The affidavits of the captain and mate of the *William Tell*, in which they state the capture on the 27th or 28th of *January*, 1808, off *Cape St. Mary's*; that they were sent to *Gibraltar*, and that, at the time of the capture, *St. Lucar* was not, as they understood, considered to be blockaded.

There were some contradictions and explanations in the affidavits of the captain and mate, as to the position of the blockading squadron, and the state of the weather, which need not now be examined; for, assuming that they have been sufficiently explained, they do not relate to the point now under consideration. There is no pretence that the blockade, if it had previously existed, had been voluntarily raised at that time, by the departure of the fleet.

This testimony, offered in denial of the blockade, does not contradict, or deny, any material facts alleged by the witnesses on the part of the defendants. It is of a negative nature, and cannot countervail the positive testimony of witnesses, who spoke from *what they saw and heard at the places invested. Taking the testimony together, and making a just analysis and comparison of it, the existence of the blockade appears to be conclusively established.

The verdict is, therefore, decidedly against evidence.

Nor do I apprehend that the charge of the learned judge was altogether correct, when he told the jury that if they had doubts whether *St. Lucar* was blockaded on the 27th of *January*, they ought to find for the plaintiffs. If the plaintiffs had, in the first instance, made out their demand with certainty, and the matter set up in avoidance had been uncertain, then, undoubtedly, the plaintiffs ought to have prevailed; as, if a suit be on a bond, which is proved or admitted, and the defence of payment, or a release, is not made out clearly, the certainty of the demand ought to prevail over the uncertainty of the defence. But this principle is not applicable to the case. The plaintiffs did not make out their demand, in the first instance, with any certainty. If they had stated, and shown, a clear loss by sea perils, it would then have lain with the defendants to have brought themselves within the exception. But here, their very testimony involved the question whether there was not a loss by blockade, and especially as the sentence of condemnation was part of the plaintiffs' case, and introduced as annexed to, and forming part of, the affidavit of the captain of the *William Tell*. This is not a case, then, of a defendant setting up matter in avoidance of a

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demand, which, of itself, is clear and certain. In making their demand, the plaintiffs raise the discussion of the very gist of the controversy, as much as if they had brought an action of trespass for an assault; and then the other rule of evidence applies, that if the right of recovery be uncertain and doubtful, the jury ought to lean against the plaintiff. But the true question here is, on which side did the weight of testimony materially preponderate, and not whether there were no doubts on the case. That rule would be too severe and rigorous, and would, in most cases depending on matters of fact much litigated, leave a defendant in hopeless despair. It can never apply (if it ever is to be applied) but to cases in which the plaintiff's right of action is, *per se*, absolutely certain, and is only to be defeated by other special matter set up in avoidance, or justification.

The verdicts, therefore, in these two causes, ought to be set aside, and new trials awarded, with costs to abide the event of the suits.

New trial granted.

[* 285] *MACKAY AND ANOTHER *against* J. AND L. BLOODGOOD.

Where one of two partners executed an *arbitration bond*, to which he subscribed the name of the firm, and affixed one seal, the other partner having previously read and approved the bond, and consenting that his copartner should execute it for both, and being in the store at the time of the execution, though it was not actually signed and sealed in his immediate presence, this was held a good execution of the bond, so as to make it the deed of both.

(a)

THIS was an action of debt. The declaration contained two counts. The first count stated a submission by the parties, by *bond*, to *arbitrators*, and an *award* of two hundred and forty-three dollars and sixty-eight cents, in favor of the plaintiffs, and a *breach* by reason of the non-payment of that sum by the defendants. The second count was for fifty-six dollars and thirty-two cents, on an *insimul computassent*.

The cause was tried at the *Albany* circuit, in *April*, 1812, before Mr. Justice *Spencer*. The plaintiffs produced the bond and award. The bond was in the usual form, and was subscribed by one of the defendants, with the name of the firm, and sealed with one seal, thus: "*J. & L. Bloodgood, (L. s.)*" The subscribing witness to the bond testified, that it was executed by *L. Bloodgood*, one of the defendants, who signed the partnership name. *James Bloodgood*, the other partner, was about the store at the time of the execution, but the witness did not recollect that he was actually in the room when the bond was signed.

One of the arbitrators testified that *L. Bloodgood* only signed the name of the firm, and affixed but one seal, and the other partner was not actually present when it was so signed and sealed; that *James B.* saw the bond before it was executed, and approved of it; and *L. B.* said to *J. B.* that he (*L. B.*) would execute the bond for both of them, to which *J. B.* consented.

The making and execution of the award were also proved.

The counsel for the defendants moved for a nonsuit, on the ground that the bond was not executed by both defendants; and because the award was not according to the submission, &c. The judge overruled the objections, and decided that the

(a) A partner cannot do any act under seal to affect the interest of his copartner, unless it be to release a debt. And where one partner enters into a submission in the name of himself and his copartner, and, as the attorney of his copartner without any power of attorney, the submission is valid only as against the former, as it cannot be presumed that he acts under the assent or authority of the latter. *M'Bride v. Hagan*, 1 *Wendell*, 396. Vide *Smith v. Platt*, *infra*, 306.

evidence was admissible, and sufficient to entitle the plaintiff to recover. The defendants then offered to set off a debt due to them from *James Mackay*, one of the plaintiffs; but this was objected to, because no notice of set-off accompanied the plea, and because the several debt of one of the plaintiffs could not be set off against a joint demand. The judge rejected the evidence, and the jury, under his direction, found a verdict for the plaintiffs.

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A motion was made to set aside the verdict, and for a new trial.

**I. Hamilton* and *Foot*, for the defendants, contended, that the bond was not well executed by both of the defendants. Both of the defendants must sign and seal, or the one must show an authority from the other to execute the instrument for him.

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An authority to execute a deed, must be by deed. An agent cannot bind his principal by deed, unless he is authorized by deed. (*Com. Dig. Attorney*, (C. 1.) (C. 5.) *Fait*, (A. 2.) (A. 3.) (G.) A seal is essential to a deed, and it must be an actual sealing with wafer or wax, or some substance capable of receiving an impression. (5 *Johns. Rep.* 239.) The signing and sealing are not alone sufficient to give validity to a deed. There must be a *delivery* of it, also, by the party, or by his authority.

It is settled, that one partner has no authority to bind his co-partner *by deed*. (7 *Term Rep.* 267.) In the case of *Ball v. Dunsterville*, (4 *Term Rep.* 313,) the bill of sale related to a partnership transaction, and the court relied on the circumstance that it was executed by one of the partners, for himself and the other, *in the presence* of the other.

In the present case, *Brown*, the subscribing witness, does not state that *James Bloodgood* was present when his partner executed the bond, or that he gave any manner of authority to *L. Bloodgood* to execute it for him. The subscribing witness is the only competent witness to prove the execution of a deed. (3 *Johns. Rep.* 477. 1 *Esp. N. P. Cas.* 89.) Where he is produced, or can be produced, no other evidence can be resorted to.

H. Bleeker, contra, relied on the case of *Ball v. Dunsterville*, as an authority to show that where one partner executes a deed for himself and his copartner, by authority of such partner, and in his presence, it is a good deed, though but once sealed. This was acknowledged to be the rule of law in the case of *Ludlow and others v. Simond*, decided in the Court of Errors, (2 *Caines' Cas. in Er.* 1. 42. 55,) where this point was fully discussed. It was proved that the other partner saw and approved of the deed before it was executed, and was in the store, at the time of its execution. This is sufficient to bring it within the principle of the decision in *Ball v. Dunsterville*.

Per Curiam. One seal was sufficient, in this case, for both the obligors. It has been always held that one piece of wax may serve for several grantors, and that another person may

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seal for the obligor. (*Perk. s. 134.*) In Lord *Lovelace's case*, (*Sir W. Jones, 268.*) it was admitted by the king's attorney, that "If one of the officers of the forest put one seal to the rolls, by assent of all *the verderers, regards, and other officers, it is as good as if every one had put his several seal; as in case divers men enter into obligation, and they all consent and set but one seal to it, it is a good obligation of them all." The late case of *Ball v. Dunsterville* (4 *Term Rep.* 313) carries the rule to the extent contended for by the plaintiffs in the present case. It was there held that if one partner, in a transaction, seal a deed with one seal, for and on behalf of himself and his partner, and by authority and in the presence of the other, it is a good execution of the deed for both. In the present case, one of the defendants sealed the bond, with one seal, for himself and his partner, with the consent of his partner, and after the partner had seen and approved of the bond, and while he was about the store, at the time of the execution. This evidence was sufficient to carry the cause to the jury, and to justify them in finding it the deed of both.

This is the only point in the case deserving of any consideration, for the objections to the award were not much relied on by the counsel, and are of no weight. Motion denied.

HARRY CROSWELL against BYRNES.

IN error, from the *Albany* Mayor's Court, or Court of Common Pleas.

Byrnes brought an action of *assumpsit* against *Croswell*, in the court below. The declaration was on a bill of exchange, dated the 22d of *September*, 1810, for one hundred and twenty-four dollars and sixteen cents, drawn by *Henry Wiswell*, directed to the defendant below, by the name of *Henry Croswell*, payable to *Byrnes*, or order, on demand; which was accepted by *Croswell*, payable ninety days from the date.

The defendant below pleaded, 1. *Non assumpsit*; 2. That *Byrnes*, in *February* term, 1811, sued the defendant in the Mayor's Court of *Albany*, on the same bill, &c. and recovered judgment for one hundred and forty-five dollars and twenty-five cents, *prout patet per recordum*, &c.

The plaintiff replied *nul tiel record*. There was a trial by record, and *Croswell* did not appear, nor produce the record on which judgment was given for the plaintiff, *Byrnes*, on the second plea. On the first issue there was a trial by jury, and a verdict found for the plaintiff, on which judgment was given by the court below.

The *bill of exceptions* stated the pleadings and issues, and that the defendant, on the trial of the second issue, produced the record in support of the second plea, which record was set forth. It stated the declaration, in which the bill is described as drawn on *Harry Croswell*; that a judgment was entered by

(a) Vide *Brown v. Van Deusen*, 10 *Johas. Rep.* 51. *Dubois v. Dubois*, 2 *Wendell*, 418. *Jackson v. Wood*, 3 *Wendell*, 27.

On the issue of *nul tiel record*, the record of a judgment was produced, to rebut which the plaintiff produced a rule of the court, subsequent to the judgment, setting it aside for irregularity. It was held that the entry of the rule on the minutes, could not be received as evidence against the record, which imports verity, and can be tried only by itself;

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but the *vacatur* must be enrolled, or entered of record. No proceeding is regarded as matter of record, until it is enrolled. (a)

default, for want of a plea, for one hundred and forty-five dollars and twenty-five cents, damages and costs, and the judgment signed, and filed the 9th of *March*, 1811. It appeared further, that on the trial of the issue by record, after *Croswell* had produced the record above-mentioned, the plaintiff, in order to disprove it, produced the book of the minutes of the entries in the court below, in which was entered a rule, in *August* term, 1811, by which the default, and all subsequent proceedings, were ordered to be set aside, for irregularity, with costs, and that *Croswell* be discharged from custody on the *ca. sa.* issued on that judgment. The court below decided, that the entry of the rule destroyed the record of the judgment; and that there was, therefore, a failure of record. It also appeared that, on the trial of the first issue, the plaintiff produced the bill of exchange, which was directed to Mr. *Henry Croswell*; on which was written, "accepted, payable in ninety days. *September 22, 1810. H. Croswell.*" The defendant objected, that this was not the same bill as that described in the declaration, as drawn on *Harry Cröswell*; and that there was no such custom of merchants, as to a bill so accepted; that the parties were not merchants, and that the acceptance was not sufficient to charge the defendant, and moved for a nonsuit. The court below intimated an opinion that the alleged variance was fatal, the plaintiff produced the original declaration, filed on the 11th of *February*, 1811, in which the bill is stated to be drawn on *Henry Cröswell*. The defendant's counsel insisted that the copy of the declaration served ought to govern, and not the original; but the court decided that the original declaration on file must govern, which was to be read *Henry*, and not *Harry*, and denied the motion for a nonsuit, on which a verdict was found for the plaintiff, under the direction of the court. To this opinion of the court a *bill of exceptions* was tendered, which was signed and sealed by the recorder. (a)

*The errors assigned were, 1. That the court below decided that the *rule* discharged the record, whereas the record produced was sufficient to maintain the issue of *nul tiel record*, and the rule was inadmissible.

2. That the court ruled, as to the first issue, that the evidence was sufficient to entitle the plaintiff to recover.

(a) On the last non-entomated day of *January* term, before the cause was argued, the *Recorder* of the city of *Albany*, by virtue of a writ issued for that purpose, was brought into this court, to confess or deny his seal to the bill of exceptions. He came into court with *Lush*, the plaintiff's counsel, and the bill of exceptions being sealed, Mr. *Lush* delivered it into the hands of the *Chief Justice*, who, showing the seal to the *Recorder*, asked him if that was his seal put to the bill of exceptions, to which the *Recorder* answered in the affirmative.

Sedgwick, for the defendant in error, then prayed leave to ask some questions of the *Recorder*, as to the trial in the court below, and the manner in which the bill of exceptions had been drawn up and sealed; to which *Lush* objected.

SPENCER, J. Did you ever hear of such a question being put on such an occasion?

Per Curiam. No other question can be put, than the one already asked: "Is this your seal, or not, put to this bill of exceptions?" To which the *Recorder* has answered. The statute authorizes no other question. (See *Money and others v. Leach*, 3 *Burr.* 1692. 1 *Bl. Rep.* 553. S. C.)

NOTE. The *Recorder* then retired, and the court ordered the bill to be filed and the *Chief Justice* handed it to the clerk for that purpose.

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3. There was no plaint filed in the court below.

4. That the record states that the defendant pleaded on the first *Tuesday* of *August*, 1811, whereas no plea was filed on that day.

5. That no replication was filed, as stated on the record.

6. That the record states that the issue was joined in *September* term, 1811, whereas the *venire* was issued long before.

The cause was argued by *I. Hamilton*, for the plaintiff in error, and *H. Bleecker*, for the defendant in error.

It is necessary, to state the argument on the first point only.

For the plaintiff in error, it was contended, that records, being of *absolute verity*, could be tried only by themselves. (1 *Inst.* 260. 4 *Rep.* 52.) The ancient practice was to enter a *recordatur*. Where matter of fact is mixed with matter of record, it must be tried by a jury. (*Ld. Raym.* 211. 5 *Johns. Rep.* 112. 6 *Johns. Rep.* 26.) A rule is not a record, but a *minute* only of the court. An estreat of a fine in the Exchequer, is only a minute. (1 *Ld. Raym.* 243.) A writ of error removes only the record and process *enrolled*, not a rule, an original **bill*, or a warrant of attorney. (*Jenk. Rep.* 25.) A rule cannot destroy or vacate a record. The maxim is, *nihil tam naturale quam quidlibet dissolvi eo modo quo ligatur*. (*Jenk. Cent.* 120. 178.) A *vacatur* of the judgment should have been entered and enrolled. (2 *Johns. Cas.* 126.) A mere minute of a rule is not a record, nor can it affect a record.

For the defendant in error, it was insisted, that where a rule is obtained to set aside a judgment, even in this court, no entry of a *vacatur* is ever required. The judgment is considered as a nullity after the rule.

Per Curiam. On the issue of *nul tiel record*, a record of a judgment corresponding with the plea was produced, and to rebut that evidence, the plaintiff produced a rule of the same court, of a subsequent term to the judgment, setting aside the judgment for irregularity. There is no doubt of a competent power in the court to make such rule; but the question is, whether the entry of such a rule upon the minutes, is to be received as evidence against the record? It appears to be contrary to all the well settled technical rules upon the subject, to give the entry that effect. A record imports verity, and can only be tried by itself. The *vacatur* ought to be enrolled, or entered of record, as much as the rule for judgment. The court could not receive the entry on the minutes of a rule for judgment, as evidence to support a plea of a former recovery, and why should an entry vacating a judgment be received to contradict the enrolment of the judgment? The maxim in this, as well as in other cases, is, that *nihil tam naturale quam quidlibet dissolvi eo modo quo ligatur*. (*Jenk. Cent.* 120.) To give an entry on the minutes that authority, would destroy the certainty, order and solemnity of enrolments; and it has been frequently held, that the courts cannot regard any proceeding as a matter of record until it is enrolled. (1 *Salk.* 329. 1 *Ld. Raym.* 243. *Jenk. Cent.* 25.)

As the judgment for the damages is entire, and the plea of a former recovery went to the entire right of action, it becomes unnecessary to examine the other errors assigned, in respect to the trial of the issue joined on the plea of *non assumpsit*. The judgment rendered must be reversed *in toto*.

Judgment reversed.

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BOYCE.

***CARPENTER against ALEXANDER.**

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THIS was an action of *covenant*. The declaration stated that the defendant, on the 22d *May*, 1809, at, &c. by his certain writing, sealed, &c. covenanted and agreed, that the defendant, in and by the said writing, was held and firmly bound unto the plaintiff, his heirs, &c. in the full sum of two hundred and fifty dollars, to be paid to the plaintiff, in manner following: one hundred and twenty-five dollars on the 20th *May* then next ensuing the date of the said writing; and the further sum of one hundred and twenty-five dollars on the 20th *May*, 1811, with the interest, &c. and protesting that the defendant had not performed and fulfilled his covenants, &c. the plaintiff alleged that the said sum of one hundred and twenty-five dollars the defendant ought to have paid, according to the tenor and effect of the said writing, &c. but the said sum of one hundred and twenty-five dollars is yet unpaid; although, &c.

There was a *demurrer* to the declaration, and joinder.

H. Bleeker, in support of the *demurrer*, contended, that the breach was not assigned with sufficient certainty.

E. Williams, contra.

Per Curiam. The breach is not well assigned, for it does not appear, with sufficient certainty, which of the two sums of one hundred and twenty-five dollars has not been paid. The court can, perhaps, infer from the whole record, that the breach was intended to apply to the non-payment of the first sum mentioned in the condition of the bond; but the party ought not to leave such a fact to inference and deduction, but allege it with precision and certainty; and if he does not, he ought to be punished in costs, for slovenly and careless pleading. There must be judgment for the defendant, with leave, however, to the plaintiff to amend his declaration, on the usual terms.

Judgment for the defendant.

In an action of *covenant*, the plaintiff declared that the defendant covenanted to pay the plaintiff 250 dollars, in manner following, to wit. 125 dollars on the 20th *May* ensuing, and 125 dollars on the 20th *May*, 1811, &c. and the breach assigned was, that "the said sum of 125 dollars ought to have been paid, &c. but the said sum was unpaid, altho' the defendant was requested," &c.

On *demurrer*, it was held that the breach was not well assigned as it did not appear with sufficient certainty which of the two sums of 125 dollars had not been paid.

***STEVENS, LATE SHERIFF, &c. against BOYCE AND DALEY.**

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THIS was an action of debt, on a bond given to the plaintiff, as sheriff of *Washington* county, dated 7th *March*, 1810; conditioned that *Boyce*, his heirs, &c. should, at all times, &c. save and keep harmless, and indemnify the plaintiff, sheriff, &c. "for, touching and concerning the return and execution of all such processes, writs, and warrants, of what nature soever the

In an action of debt on a bond given to the sheriff to save harmless and indemnify the sheriff, "for, touching and concerning

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the execution and return of all processes, writs," &c. by his deputy, &c. the plaintiff in his replication, assigned as a breach, that the defendant had arrested A. B. on a cap. ad resp. and suffered him to go at large, without sufficient bail; and that the plaintiff had been attached for not bringing in the body, &c. and had been obliged to pay a certain sum, and was damaged. The defendant rejoined, that he took sufficient bail; to wit, C. D. who executed the bail-bond with A. B., for his appearance, and

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was, at the time, good and responsible, &c. On demurrer, the rejoinder was held to be insufficient; and that the defendants, by the bond, assumed every risk which the law attached to the execution of process, one of which was the continued responsibility of the bail to the arrest.

same might be, as should be directed to the sheriff of the county of *Washington*, and executed by the said *Boyce*, as his deputy, and of and from all issues, fines, &c. and for and concerning the not executing, or wrongfully executing, or detaining in his hands, any such writ, &c. as shall be delivered to him to be executed as deputy-sheriff, &c. and from all damages for the escape of any person, &c. and also, that the said *Boyce* should truly account for and pay to the plaintiff, all such sum and sums of money as he, the said *Boyce*, should, as deputy-sheriff, levy, and receive," &c.

The defendants pleaded, that the defendant *Boyce* did save and keep harmless the plaintiff, &c. and did account and pay over, &c. according to the condition of the bond, and did truly perform the condition, &c.

The plaintiff replied, that the defendant did not save and keep harmless the plaintiff, &c. and did not account and pay, &c. and did not keep and perform the condition of the said bond, &c. but failed to do so, in this, that after the execution of the said bond, and while the said *Boyce* remained the deputy of the plaintiff, &c. to wit on the 11th *June*, 1810, at, &c. a writ of *capias ad respondendum* was sued out of this court, in behalf of *F. Purdy* against *D. Richardson*, tested, &c. and directed to the sheriff of *Washington*, commanding him, &c. which writ came to the hands of the said *Boyce*, as deputy-sheriff, who, before the return-day, executed it, and arrested *Richardson*, but, then and there, suffered him, without sufficient bail, to go at large, &c. and the plaintiff was, by a rule of the court, ordered to bring in the body of the said *Richardson*, &c. of which the said *Boyce* was duly apprized and had notice: and the body of the said *Richardson*, not being *brought in, &c. an attachment was issued against the plaintiff, of which the defendant, *Boyce*, had due notice, &c. that the plaintiff was taken on the attachment, and was under the necessity of paying, in order to obtain his discharge, the sum of two hundred and ninety-three dollars and thirty-nine cents, &c. &c.

Rejoinder, that *Boyce* arrested *Richardson*, on the *capias*, &c. and, according to the statute, took bail for his appearance, at the return of the writ; and that, on that occasion, one *George Ackley*, of, &c. became bail, &c. and executed a *bail-bond* with the said *Richardson*, for his appearance, &c. and which bail-bond was in the possession of the plaintiff; and the defendants averred, that the said *Ackley*, at the time he executed the bail-bond, had sufficient to answer, &c. and was good and responsible, of all which the sheriff had notice, &c.

To this *rejoinder*, there was a demurrer, and joinder in demurrer.

Z. R. Shepherd, in support of the demurrer.

J. Russel, contra.

Per Curiam. The rejoinder is no answer to the breach assigned in the replication. The sheriff, under the statute, may require two sureties in the bail-bond, though the bond is good with one only. He, however, takes the securities (whether one

or more) at his peril; and in this case the defendants had assumed that peril by their bond, for they engaged to save the plaintiff harmless "for, touching and concerning the return and execution of all processes, writs," &c. And the harm which the plaintiff states in this case, arose touching or concerning the execution of a writ. These words were intended to throw the whole peril attending the execution and return of process, by the deputy, upon the deputy. They were not to be confined to cases where the deputy had failed in good faith and due discretion, but to all the risks which the law attached to the execution of process, and one risk is the permanent and continued responsibility of the bail to the arrest. The sheriff runs that risk, and the bond throws that risk upon the deputy, as to acts performed by him. The plaintiff is, consequently, entitled to judgment. Judgment for the plaintiff.

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BISHOP

v.
ELY.

*BISHOP against ELY AND OTHERS.

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THIS was an action of trespass, brought against the defendant for driving against the horse of the plaintiff, on the highway, so forcibly that the tongue of the defendants' wagon pierced the breast of the plaintiff's horse, in consequence of which he died.

Ely, one of the defendants, pleaded not guilty, and that he was a mere passenger in the wagon. The other two defendants suffered judgment by default to be entered against them. The cause was tried at the *Washington* circuit, before Mr. Justice Yates in *June*, 1812.

A witness for the plaintiff testified, that he was with the plaintiff, and hearing a wagon coming rapidly on the road, advised the plaintiff to turn out of the road, which he immediately did, quite out of the road to the right, when the tongue of the wagon of the defendants struck the breast of the plaintiff's horse with great force, and when the plaintiff said he hoped nothing was hurt, one of the defendants abused him for not keeping out of the road.

Another witness saw the defendants at a tavern, about half a mile from the place where the plaintiff's horse was injured, and they were in high spirits, and talking of what had happened. *Ely* said to one of the defendants, he must take care how he run against people. The horse died of the wound he received.

The wagon belonged to *Ely*, and the horses to the other defendants, one of whom (*A.*) was driving the wagon when the plaintiff's horse was hurt. *Ely* was asked by the other defendants to go with them in the wagon.

The jury found a verdict for the plaintiff, against *Ely*, as equally guilty with the other defendants.

A motion was made to set aside the verdict, and for a new trial.

A. lent his wagon to *B.* & *C.* who put their own horses to it; and *A.* at the invitation of *B.* and *C.*, rode with them in the wagon. *B.* drove the wagon, and ran with so much violence against the horse of *D.*, who was before on the road, and had turned out, that the horse was wounded by the tongue of the wagon of *A.*, and soon after died. In an action of trespass brought by *D.* against *A.*, *B.*, and *C.*, it was held, that *A.* was not a mere passenger; but equally liable with *B.* and *C.* for a joint trespass. (a)

(a) If an act done, cause immediate injury, whether it be intentional or not, trespass lies; and if done by the co-operation of several persons, all are trespassers, and all may be sued jointly, or one is liable for the injury done by all; but it must appear that they acted in concert, or that the act of the individual sought to be charged, ordinarily and naturally produced the acts of the others. *Guille v. Swan*, 19 Johns. Rep. 381.

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Crary, for the defendants, contended, that *Ely* had done no act that could make him a trespasser. He was a mere passenger in the wagon, and had no control over the horses. To make a person liable, in such case, it must be shown that he was driving the wagon or carriage. Would a passenger in the public stage coach be liable as a trespasser, if the driver should run against another carriage? (5 *Esp. Rep.* 18. 1 *East*, 106.) It does not appear that *Ely* was in any way consenting to the trespass, or that he could have prevented it.

**Z. R. Shepherd*, contra, insisted that *Ely* was not a mere passenger. He was the owner of the wagon, and being in it at the time, he must be considered as a party to the trespass. He was one of the company in the wagon, and present at the time the trespass was committed; and if liable at all, it must be in an action of trespass. (4 *Esp. Cas.* 229.)

In the case of *M Manus v. Cricket*, (1 *East*, 106,) the master was not present, and it was, therefore, held, that he could not be liable as a trespasser.

Per Curiam. Here was evidence sufficient to charge all the three defendants with a joint trespass. They were all together in the wagon, and each had his due share of interest in the horses and wagon. *Ely* owned the wagon, and was not in the light of a mere passenger. The case of *Davey v. Chamberlain* (4 *Esp. N. P.* 229,) applies. It does not appear that *Ely* dissented, at the time, from the violent manner of driving the team, nor at the time of the accident; and when seen, shortly after, at the tavern, he acted as one of the party, jointly concerned in the act, for they were all in high spirits, and he expressed no dissent, or even regret.

Motion denied.

YEOMANS against CHATTERTON.

At a meeting of the creditors of *K.* an insolvent, *C.* one of the creditors, refused to subscribe the petition for his discharge, unless he was first paid, or secured, the sum of

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50 dollars, part of his demand, and *B.* gave his promissory note to *C.* for 50 dollars, who thereupon signed the petition for the balance due him from *K.* In an action brought by *C.* against *B.*

IN error, from the *Ulster* Court of Common Pleas. *Chatterton* brought an action of *assumpsit* against *Yeomans*, in the court below. The declaration was in the usual form, on a promissory note, for fifty dollars, dated the 20th of *December*, 1809, made by *Yeomans*, payable to *Chatterton* the 15th of *April* ensuing.

The defendant pleaded *non assumpsit*, with notice of special matter to be given in evidence at the trial.

*The execution of the note was admitted, and the defendant proved that *Chatterton*, on the 20th of *December*, 1809, took and subscribed the oath, prescribed by the insolvent act, as one of the petitioning creditors of *Jacob Ketcham*, an insolvent debtor, for three hundred and ninety-six dollars.

Ketcham testified, that before the 20th of *December*, 1809, *Yeomans*, at his request, went to the city of *New-York* for the purpose of obtaining the creditors of *Ketcham* to subscribe the petition for his discharge under the insolvent act. At a meeting of the creditors of *Ketcham*, *Chatterton* absolutely re-

fused to become a petitioning creditor, unless some person would give him a good note for fifty dollars, to be deducted from his demand; upon which *Yeomans* gave the note in question, for the purpose and consideration that the plaintiff should become a petitioning creditor of *Ketcham*; and the plaintiff accordingly subscribed the petition for the sum of three hundred and ninety-six dollars, after deducting from his demand the sum of fifty dollars, secured by the note. *Ketcham* was present when the note was given to the plaintiff.

The plaintiff's counsel, on the cross-examination of *Ketcham*, asked him whether he had not paid the amount of the note to *Yeomans*, or indemnified him against it; the counsel for the defendant objected to the evidence, as the note, being void in its inception, could not be revived, or made good, by any subsequent agreement or transaction between the defendant and *Ketcham*. The court decided that the evidence was admissible, which was accordingly given; and the defendant's counsel tendered a bill of exceptions to the opinion of the court.

The jury gave a verdict for the plaintiff, for fifty-four dollars and ninety-eight cents.

H. Bleeker, for the plaintiff in error, contended, that the note being absolutely fraudulent and void, under the insolvent act, the evidence admitted was improper. He cited *Waite v. Harper*, 2 Johns. Rep. 486, and *Bruce v. Lee and another*, 4 Johns. Rep. 410.

Ruggles, contra, insisted, that this case was different from those which had been cited. The note was expressed to be for value received, which imported a consideration. *Chatterton* received the note as a part payment, at a meeting of the creditors. It was no fraud against them. It is precisely as if he had said, "pay me fifty dollars of my debt, and I will subscribe for the balance." It was an *open and fair payment, without fraud or concealment. It does not appear whether three-fourths of *Ketcham's* creditors, besides the plaintiff, had subscribed his petition.

Per Curiam. The note on which the suit below was brought, was given to *Chatterton* in payment of part of his demand against *Ketcham*, and upon the evident understanding and confidence, that he should become a petitioning creditor, under the insolvent act, for the residue of his demand, as he accordingly did. The note was, consequently, void, as being given against the policy, and in fraud of the insolvent act of the 3d of April, 1801. (a) By that act, the petitioning creditor makes affidavit that such a sum is due, or will become due, and that he hath not received from the insolvent, or any other person, any payment of part of his demand, in money, or by sale, &c. or any gift, or reward, upon any contract or confidence, that he should become a petitioner. Here *Chatterton* did receive payment of part of his demand, by delivery of a thing in action, i. e. the note, and upon the confidence that he should become a petitioner. The demand here, in the oath which the creditor takes, is not to be confined to the sum

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on the note for 50 dollars, it was held that the note was absolutely void, as being a gainst the policy, and in fraud of the insolvent act: and evidence to show that K. had paid or indemnified B. for the amount of the note was inadmissible. (a)

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(a) 2 R. S.
16: 17, sec. 4.

(a) Vide *Payne v. Eden*, 3 Caines' Rep. 213. *Wiggin v. Bush*, 12 John. Rep. 306. *Tuxbury v. Miller*, 19 Johns. Rep. 311.

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already mentioned in the affidavit, for that would be an absurd construction of the act. After the creditor has already said that such a sum was due, it would be idle to swear further that he has not received payment of part of it. The statute refers to his pre-existing demands, whenever and whatever they may be. He must receive no part, in consideration of his becoming a petitioner. If he holds two notes against the debtor, he must not receive payment of one of them, in consideration of becoming a petitioner for the other. The policy of the statute is to preserve just dealing, equality, and good faith between the creditors; not that one creditor should be induced to become a petitioner for his whole demand, by the apparently benevolent example of another, who has secretly extorted nineteen-twentieths of his demand, on the condition of becoming a petitioner for the remainder. This position being established, it follows, that the questions admitted by the court below to be put to the witness, were irrelevant, immaterial, and, consequently, improper. The testimony, thus admitted, tended to mislead the jury from the true point, and induced them to act upon erroneous impressions. If the note was void *ab initio*, any testimony that *Ketcham* had indemnified *Yeomans*, was useless and improper.

Judgment reversed.

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Where a grantor, in his deed, reserved to himself, his heirs and assigns, for ever, "the right and privilege of erecting a mill-dam at a certain place described, and to occupy and possess the said premises without any hindrance or molestation from the grantee, or his heirs," &c., it was held that the right reserved was such an interest in the land, as that an action of ejectment would lie for it.

Wherever a right of entry exists, and the interest is tangible, so that possession of it can be delivered, an ejectment will lie for

THIS was an action of ejectment, to recover the possession of part of lot No. ninety-four, in the township of *Ulysses*. The cause was tried at the *Seneca* circuit, in *June*, 1812, before Mr. Justice *Spencer*.

The plaintiff produced in evidence a patent to *Hendrick Loux*, one of the lessors, dated the 8th of *July*, 1790, for the whole of lot No. ninety-four, also a deed for the same lot from *Jeremiah Van Rensselaer*, to whom it had been awarded, to *Robert M'Dowel*, dated the 24th of *April*, 1792. *M'Dowel* was dead, and the other lessors were his heirs at law.

The defendant gave in evidence a deed, dated the 30th *April*, 1797, from *M'Dowel* to *John Smith*, for ten acres, part of the lot No. ninety-four, containing a reservation in the words following, to wit, "Excepting and reserving to the said *Robert M'Dowel*, his heirs and assigns, for ever, the right and privilege, without any fee or reward, of erecting and building a dam on the back of the creek, near or at the place where the east line of the above granted premises crosses said creek, along the west bank of said creek, about twenty rods, or near where the mill-seat is, to occupy and possess the aforesaid premises, without any let, hindrance or molestation from the said party of the second part, his heirs or assigns, agreeably to the express condition contained in the foregoing clause and reservation." The deed of *John Smith* to the defendant, for the said ten acres of land was also read in evidence. It was

proved that the defendant was in possession of the whole ten acres, and that the defendant's mill-dam extended twenty-four links on the land of the lessors of the plaintiff. In 1811, *Pelton*, one of the lessors, requested the defendant to let him enter on the premises, and build a dam on the creek, according to the reservation in *M'Dowel's* deed to *Smith*, which was refused by the defendant. A verdict was taken for the plaintiff, subject to the opinion of the court. And the question was, whether, under the judgment, possession could be taken of the premises reserved in the deed from *M'Dowel* to *Smith*, or only of the premises in the possession of the defendant, and not included in the ten acres.

Foot, for the plaintiff, contended, that the privilege reserved was like a right of way, for which an ejectment will lie. He cited **Runn. Eject.* 131, 132. 1 *Term Rep.* 361. 2 *Term Rep.* 452. 3 *Term Rep.* 772. 4 *Term Rep.* 671. 6 *Term Rep.* 359.

Rodman, contra, insisted, that the right reserved was not such that the sheriff could, in case of a recovery, give possession of it. It was a mere license to use land, for which an ejectment will not lie. 2 *East*, 190. *Chitt. Plead.* 175. 188.

Per Curiam. The lessor of the plaintiff is entitled to recover for the possession of the defendant, extending beyond the ten acres. This is admitted by the case; but the great point is, whether the right reserved in the deed of *erecting or building a dam on the bank of the creek at the place specified*, be such an interest as that an ejectment will lie for it. The exception further states that the grantor, &c. is to *occupy and possess the aforesaid premises without any let, &c.* It is evident that an interest in the soil was reserved at the given place, not only for erecting the dam, but for occupying and possessing it. There can be no doubt but that this interest would be considered a *tenement*, within the decisions under the *English* settlement law; for it has been held that a right of pasturage, of a dairy, of a rabbit warren, and of a fishery, carried such an interest in the land as to create a tenement. (1 *Term Rep.* 358. 2 *Term Rep.* 451. 3 *Term Rep.* 772. 4 *Term Rep.* 671.) In one of the cases, *Ashhurst*, J. said that a fishery was a tenement, and recoverable in ejectment; and in another of them, Lord *Kenyon* held that a *præcipe* would lie for a free warren, though the party has no further interest in the land than to enter and use the animals; and if a *præcipe* will lie *à fortiori* an ejectment, which requires much less certainty, will lie. In *Mellington v. Goodlittle*, (*And.* 106,) it was decided in error, that an ejectment would lie for a beast or cattle-gate which was a right of common for a beast; and in that case the court admitted that an ejectment would lie for a common appurtenant. Whenever a right of entry exists, and the interest is tangible, so that possession can be delivered, an ejectment will lie; and such an interest was reserved by the deed in question.

The lessor of the plaintiff is, accordingly, entitled to recover,

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ment will lie for
1.(a)

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(a) Ejectment will lie for any thing attached to the soil, of which the sheriff can deliver possession. *Jackson v. May*, 16 *Johns. Rep.* 184.

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as well the premises reserved, as the other land encroached upon by the defendant.

*KELLOGG, ASSIGNEE OF THE SHERIFF, &c. *against*
MANRO AND BROWN.

Where a defendant arrested on *mesne* process, having been surrendered into the custody of the sheriff, in discharge of his bail, was permitted to go at large within the liberties of the gaol, on giving a bond as security to the sheriff, in the usual form, afterwards escaped and went beyond the liberties; and the sheriff, on the 1st October, 1810, assigned the bond to the plaintiff, who brought an action thereon, it was held that the taking of the bond was authorized by the act of the 30th March, 1801, (sess. 24, c. 91,) the defendant being in custody on civil process only; and it was therefore assignable under the act of the 28th March, 1809. (Sess. 32, c. 148.) [vide 2 R. S. 433, s. 40. *Id.* 436, s. 55.]

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The plaintiff in the suit on such bond is *prima facie*, entitled to recover the whole debt due in the original suit; and, at least, as much as he has actually

THIS was an action of debt. The declaration stated that *Manro* became special bail for *Brown*, in the *Onondago* Court of Common Pleas, in *January* term, 1809, in an action of *covenant* brought by the plaintiff, &c.; that a judgment was recovered by the plaintiff in that suit, which remained of record, in full force, &c.; that the defendant, *Brown*, on the 11th *December*, 1809, surrendered himself before a judge, in discharge of his bail, and was thereupon committed to the custody of the sheriff; that, on the same day, both defendants executed a bail-bond to the sheriff, conditioned that *Brown* should remain a faithful prisoner, &c. (being a bond in the usual form for the gaol liberties.) The plaintiff averred, that the defendant, *Brown*, did not remain a true and faithful prisoner, &c. but escaped, on the 1st *March*, 1810, and went without the limits, &c. without being discharged, &c. and without the permission of the plaintiff, who remains wholly unpaid, &c.; that the sheriff, on the 1st *October*, 1810, assigned said bond, according to the statute, to the plaintiff, whereby an action has accrued, &c.

At the trial of the cause, the plaintiff gave in evidence the bond and assignment, the record of the judgment against *Brown*, the *bail-piece* and *committitur*, and the consent of the plaintiff that an *exoneretur* be entered on the *bail-piece*, *January* 4, 1810. He also proved the escape of *Brown*. The defendants proved that *Brown* was insolvent, and the only property he possessed was a cow of the value of sixteen dollars; and his counsel contended that the plaintiff was not entitled to recover; 1. Because no *exoneretur* had been entered on the *bail-piece*; 2. Because no *ca. sa.* had been issued or returned in the original action against *Brown*; and, 3. That if the plaintiff was entitled to recover, it could be only nominal damages. The judge overruled these objections, and directed the jury to find a verdict for the plaintiff, for sixteen dollars, the value of the cow, and the jury found accordingly.

*The defendants moved in arrest of judgment, and also for a new trial.

Cady and *Curtiss*, for the defendants, contended, in support of the motion in *arrest*, that the bond was not assignable, as it was taken previous to the act of the 17th *March*, 1810; (sess. 34. c. 68;) and it is only bonds taken in pursuance of that act that can be assigned.

2. On the motion for a new trial, they contended that the plaintiff was entitled to nominal damages only. The acts of the legislature do not declare what damages are to be recover-

ed in actions on bonds taken on mesne process. If the sheriff himself had brought an action for the escape, he could have recovered no more than nominal damages, as no suit had been brought against him. The act of 28th March, 1809, (sess. 32. c. 148,) rendering bonds taken for the gaol liberties assignable, speaks of prisoners in *execution*, and relates only to bonds taken on imprisonment on *final process*. The plaintiff cannot recover more than the sheriff himself could have recovered.

Kellogg, contra. 1. By the act of 30th March, 1801, (sess. 24. c. 91,) it is declared to be the duty of the sheriff to permit any prisoner, in his custody on *civil process* only, to go at large within the limits of the gaol liberties, on his giving security, by bond, as provided by the act. If the plaintiff could, by that act, take a bail-bond for the liberties in this case, then, by the act of 28th March, 1809, such bond is made assignable. It is manifest from the preamble to the act of the 17th March, 1810, that it is declaratory of that of 1801, which extends to the present case, as *Brown* must be considered in custody on *civil process* only. The bond, therefore, by the act of the 28th March, 1809, was assignable.

2. As to a new trial. The plaintiff gave his written consent that the *exoneretur* might be entered on the bail-piece, and it was in the power of the defendant to complete the *exoneretur* at any time. The plaintiff had done all in his power. In regard to the amount of damages, the plaintiff has the most reason to complain, for he ought to have recovered the whole amount of the judgment in the original action. At any rate, the plaintiff is entitled, at common law, to recover what he has lost by the escape of the prisoner; and he has lost to the amount of the property of the defendant, in the original suit.

**Per Curiam*. If the bond stated in the declaration was authorized by the act of 1801, (*Laws*, v. 1. p. 350,) then there cannot be a doubt of its having been duly assigned. The act directed the sheriffs to grant the liberties to all prisoners "who should be in their custody on civil process only," on taking the bond with requisite security. The term *civil process* was here used in contra-distinction to criminal process. A person in custody, on surrender, in a civil suit, is committed by a *committitur* under the hand of the judge, and is detained under the original process by which he was at first arrested. The surrender does away the effect of the recognisance of bail, and leaves the party under the power of the original process, in the same manner as if bail had never been taken. He is in custody, either under the original process, or the *committitur*; and if he is to be deemed in prison under the latter, it is still process, within the meaning of the act; for it is an authority exercised in a civil suit, and of sufficient legal validity to justify the sheriff. The case is also within the meaning and equity of the act. The statute of 1810 is declaratory, and shows the legislative sense to be, that the act of 1801 applied to the case. There is, then, no ground to arrest the judgment, and that motion is, therefore, denied.

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lost by the escape. (a)
Where, on a surrender and *committitur* of the defendant by his bail, the plaintiff consented to an *exoneretur*, this was deemed a sufficient discharge, as it regarded the plaintiff; as the *exoneretur* might be entered by the bail, at any time, and pleaded (a)

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(a) Vide *Russell v. Turner*, 7 Johns. Rep. 189.

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The motion upon the case to set aside the verdict is not well founded. It appears that an *exoneretur* was consented to by the plaintiff, after all the previous steps to entitle the party to it had been taken. The entry of it upon record was, then, a matter of course, and to be done at any time by the defendant. The plaintiff could not, after that consent, have prosecuted the recognisance with success, or even with good faith, and the defendant would, at any time, have been entitled to have entered it, and to have pleaded it. The only question, then, is, whether the plaintiff cannot, upon such a bond, recover beyond nominal damages. This point is too plain to admit of discussion. He is entitled, *prima facie*, to recover his whole debt, which is presumed to be lost by the escape, and it could only have been reduced down to the sum found by the verdict, upon the evidence given, that if the party had not escaped, there was no ground to consider that any greater sum could have been recovered of the original defendant by the coercion of confinement.

Motions denied.

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*TROUP, ADMINISTRATOR OF PULTENEY, against
MULLENDER.

Lands were conveyed to P. an alien, under the act of the 2d of April, 1798, and his agent leaving the lands by a parol demise, from year to year, reserving rent, and afterwards took a

(a) 3 R. S. 341. Vide 1 R. S. 720, 721, sec. 14—20.

promissory note from the tenant, for the arrears of rent, payable to P. In an action brought on the note by the administrator of P. it was held to be void under the act. (S. 25, c. 72. (a))

(a) An alien enemy, resident in the enemy's country, cannot during the war make a valid demise, so as to maintain ejectment for lands, the title to which had been ac-

THIS was an action of *assumpsit*. The declaration was on a promissory note given by the defendant to the plaintiff's intestate, dated the 27th of *December*, 1803, for three hundred and sixty-two dollars and fifty-two cents, payable on the 1st of *January*, 1805, with interest. The defendant pleaded *non assumpsit*, and *the statute of limitations*, with notice of a set-off, and that he would give in evidence at the trial, "that in and by an act of the legislature entitled 'An act to enable aliens to purchase and hold real estate in this state, under certain restrictions therein mentioned,' passed the 2d *April*, 1798, (a) it was, amongst other things, ordained, that all and every conveyance or conveyances, thereafter to be made or executed, to any alien or aliens, not being the subject or subjects of some sovereign, state or power at the time of such conveyance at war with the *United States of America*, should be deemed valid to vest the estate thereby granted in such alien or aliens, and that it should be lawful to and for such alien or aliens to have and to hold the same to his, her or their heirs and assigns, for ever, any plea of alienism to the contrary notwithstanding; provided, that it should not be lawful for any such alien to reserve any rent or service whatever, upon any *grant, lease*, or demise or conveyance whatever, to be made of any such lands or tenements; and all notes, payments, services or reservations whatever, which should be reserved or made payable, in, by, or in consequence of, such grant, lease, demise or conveyance whatsoever of any such lands or tenements, were, by the said act, declared to be utterly void and of no effect;" and that the defendant would further give in evidence "that the intestate, Sir *William Pulteney*, in his life-time, was an alien, and sub-

ject of the King of *Great Britain*; and, being such alien, did in *March*, 1801, under and by virtue of the said act, accept and receive, from *Charles Williamson*, a conveyance of a certain farm, or lot of land, being, &c. which farm, was leased to the defendant, and an annual rent reserved thereon; and that the promissory note, mentioned in the first count of the plaintiff's declaration, was given by the defendant to the said *Sir William Pulteney*, for arrears of rent, due at the date thereof, and payable in consequence of such demise; and so the defendant will contend that the said note was utterly void and of no effect." The making of the note was admitted, and there was an endorsement of two hundred and sixteen dollars and seventy-eight cents, *paid by one *Samuel Colt*, dated the 18th of *July*, 1806, signed by *John Hyslop*, who was the agent of the intestate; and who had gone to *Europe* a short time before the commencement of the present suit.

The proof of the plaintiff was objected to as insufficient to take the case out of the statute; but the judge ruled that it was *prima facie* sufficient for that purpose. The defendant then proved that the intestate was an alien; that the note was given to him on a settlement of accounts between him and the defendant; that the items of the account, admitted to be valid, were for rent for the use and occupation of a lot of land in *Ontario* county, which had been conveyed to the intestate, on the 31st of *March*, 1801; that the defendant held the land by permission of the intestate; but it did not appear that any lease had been executed, or any express reservation of rent made. A verdict was taken for the plaintiff for two hundred and ninety-eight dollars and eighty-five cents, subject to the opinion of the court, on a case containing the facts above-stated.

Henry, for the plaintiff, contended, 1. That the evidence, on the part of the plaintiff, was sufficient to take the case out of the statute. Any slight acknowledgment of a debt had been considered sufficient for that purpose. An endorsement of part payment on the note takes it out of the statute; and it has been decided, that a receipt for interest endorsed on a bond, within twenty years, would prevent the operation of the statute. (2 *Str.* 826. 2 *Ld. Raym.* 1370. S. C. 3 *Bro. P. C.* 593. 535.)

2. The special matter offered in evidence at the trial, could not be received under the notice which accompanied the plea of *non assumpsit*. A notice should, in substance, be as precise as a special plea. Now this notice does not state to whom the farm was leased, nor at what time.

Again, the statute, (*sess.* 21. c. 72,) passed the 2d of *April*, 1798, supposes the lands to be conveyed by the alien, on which the rents are reserved; but the notice does not state by whom the farm was leased; and it might be, that *Williamson* leased it. The act, no doubt, intends leases given by aliens, reserving rent.

H. Bleeker, contra, said, that the statute of limitations was a very useful act, and ought to be favored; and judges in

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quired under the act of the 2d April, 1798. The statute merely secures to aliens the title to lands, and does not relate to the remedy. The

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object of the statute was to destroy the plea of alienage which might work a forfeiture of the title, and not a plea which merely suspends the right of action during a war between the two countries. *Jackson v. Decker*, 11 *Johns. Rep.* 418.

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England, of late years, had regretted that they had been so easy to take cases out of the operation of the statute. (*Esp. Cas.* 436.) There is a great difference between *length of time* which operates as a *bar* to a claim, *and that which is used only *by way of evidence*. A jury is concluded by length of time which operates as a *bar*, as where the statute of limitations is pleaded in bar to a debt. (*Cowp.* 108.)

In the case of *Serle v. Barrington*, (2 *Ld. Raym.* 1370,) *Pratt*, Ch. J. doubted as to the evidence of the endorsement on the bond; there was a new trial granted, and it appears (3 *Bro. P. C.* 536) that, on the second trial, additional evidence was given to induce the jury to believe the bond satisfied.

In *Fuller v. Hancock*, (*Root's Rep.* 239. See 1 *Esp. Cas.* 436. *Day's* edit. n. 1,) in the Superior Court of *Connecticut*, it was decided that an endorsement on the bond did not take it out of the statute.

The facts stated in the case clearly show that the note was given for rent reserved to Sir *William Pulteney*, on land which had been conveyed to him. Any contract for letting land, reserving rent, whether by deed, or writing, or by parol, was within the statute. It was not necessary to prove a written lease.

Per Curiam. It will be unnecessary to take notice of the first point made in this cause, respecting the evidence of the endorsement, because the court are of opinion that this was a case of a parol demise, and reservation of rent, since the alienation of the premises to Sir *William Pulteney*, and, consequently, the consideration of the note was not valid under the act of the 25th session, c. 72. (a) This objection is fatal to the plaintiff's right of action. It is to be understood, from the case, that the lands were demised from year to year, under a reservation of rent, by the agent of the intestate, and that this was done as well since, as prior, to the sale to Sir *William Pulteney*, and the payments upon the note were more than sufficient to cancel all the lawful charges included in the note.

Judgment for the defendant.

(a) *R. S. ut
sup.*

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*SMITH AND PLATT *against* BURNHAM.

A. by a covenant under his hand and seal, agreed to pay B. one dollar for every thousand of timber annexed to his name in a schedule annexed to the agreement, for the privilege of floating the same down a certain stream and dam. In an action of covenant bro't

THIS was an action of covenant, by which the defendant and several other persons agreed with the plaintiffs, in consideration that the plaintiffs had "agreed to permit each of them to float down the river *Saranac*, such quantity of timber as was annexed to their names respectively, in a certain schedule thereto annexed, and to put the same over the dam," &c. that they would pay the plaintiffs at the rate of one dollar for every thousand feet of the timber annexed to their respective names, in the said schedule respectively. This agreement was duly executed, under the hands and seals of the parties, and the name of *Andrew Burnham* subscribed, and his seal affixed. The plaintiffs, in their declaration, after setting out the agree-

ment averred that there was annexed to the name of the said defendant, in the schedule annexed to the agreement, two thousand feet of timber, &c. The breaches assigned were, the non-payment of one dollar per thousand feet of the said timber, and damage done by floating the timber, &c.

The defendant pleaded *non est factum*, with a notice, that he would prove at the trial, that the plaintiffs were not damaged by floating the timber, &c.

At the trial, the plaintiffs produced the agreement, and proved its execution by the defendant. He also produced the *schedule*, which, the subscribing witness to the agreement testified, had been previously signed, and was annexed to the agreement, at the time of its execution. To the schedule was subscribed "*Delano and Burnam*, fifty-two thousand."

The counsel for the defendant moved for a nonsuit, on the ground that the name of the defendant, *Andrew Burnham*, was not in the schedule, as averred in the plaintiff's declaration. And the judge ordered the plaintiff to be called and nonsuited.

A motion was made to set aside the nonsuit, and for a new trial.

Foot, for the plaintiff.

Z. R. Shepherd, contra.

**Per Curiam.* The defendant admitted, by his covenant, that his name was annexed to the schedule, with a quantity of timber subjoined. He is, therefore, estopped to deny that *Delano and Burnam* did not include his name. *Burnam* must be considered to be the same name as *Burnham*, and he cannot set up a misnomer in avoidance of his covenant. The words "*Delano and*" may be rejected as surplusage; and if it be a distinct name, yet, as the defendant coupled his name with another, he is still responsible for the sum annexed. The omission to add his *christian* name cannot help him. A mistake of the *surname* in a deed will not vitiate; and the schedule being referred to in the covenant, it is to be taken as part of the covenant, for the purpose of estopping the defendant from denying the name which he has admitted, merely because there may be a misnomer, or because the christian name was omitted. The nonsuit ought, therefore, to be set aside, and a new trial awarded, with costs to abide the event of the suit.

Motion granted.

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by B. against A. he pleaded *non est factum*, and it appeared that the schedule annexed to the agreement was subscribed "*Delano & Burnam*," and the name of the defendant subscribed to the agreement was *Andrew Burnham*. It was held that the defendant having admitted by his covenant, that his name was subscribed to the schedule, was estopped to de-

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ny that *Delano & Burnam* did not include his name, or to allege a misnomer, in avoidance of his covenant; the schedule being taken, in this respect, as a part of the covenant. (a)

(a) Vide *Sinclair v. Jackson*, 8 Cowen, 543.

WETMORE AND CHEESEBROUGH against BAKER AND SWAN.

IN error, from the *Mayor's Court* of the city of *Albany*.

Baker and *Swan* brought an action of *assumpsit* against the plaintiffs in error, in the court below. The declaration contained two counts, one for money had and received to the use of the plaintiffs, and the other on an *insimul computasent*. Plea, *non assumpsit*. It appeared that the plaintiffs and defendants and one *Joshua Ostrom*, having run a line of

A., B. & C. and D. & E. agreed to run a line of stages from *Albany* to *Utica*; each of the three parties was to run a separate portion of the road, and to

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furnish his own horses and carriages, at his own expense [* 308] and risk, but extra expenses for extra carriages were to be paid jointly. A., B. and D. met at *Palatine*, in the county of *Montgomery*, and the accounts between the parties were examined and adjusted by F. at their request, who found a balance due from D. & E. to B. & C. of 144 dollars, for moneys received at *Albany*. It appearing that D. & E. being jointly concerned in running their part of the line, and generally understood to be partners, E. was held to be jointly chargeable for the money received by D., and for his acts; and that an action for money had and received would lie in the *Mayor's Court* in the city of *Albany*, at the suit of B. & C. against D. & E. to recover the balance so stated to be due, by the agent employed to adjust the accounts, there being no such partnership existing between the five persons concerned, as would prevent such a suit. (s) *Vide Murray v. Bogert*, 14 *Johns. Rep.* 318.

stages from *Albany* to *Utica*, there was an unsettled account between them. In *January*, 1811, a person was requested by *Baker* and *Cheesebrough* to make a settlement of the accounts; and he went to *Palatine*, in the county of *Montgomery*, for that purpose, and *Ostrom* was present at the settlement. It appeared that *Ostrom* was to receive the money earned by the *western* part of the line of stages, and the plaintiffs and defendants the money earned by the *eastern* part; and that, on an examination of the accounts and vouchers, it appeared that the plaintiffs had received less than their proportion, and the defendants so much more than their share; and upon a just distribution of the moneys received, there was a balance of one hundred and forty-four dollars due from the defendants to the plaintiffs. *Ostrom* consented to the statement of the balance, and that it should be paid to the plaintiffs; and it appeared that that sum had been received by the defendants in the city of *Albany*. The witness testified that *Wetmore* and *Cheesebrough* were jointly concerned in running their part of the line of stages, and it was generally understood that there was a partnership between them. When the adjustment of the accounts was made, he did not hear any express promise by the defendants to pay the balance so found; but he was requested by *Cheesebrough* to adjust the accounts: *Wetmore* was absent.

It was proved that the plaintiffs were to run one part of this line from *Albany* to *Utica*, the defendants another part, and *Ostrom* another part; each party to find his own horses and carriages, at his own expense, and bear all losses, except extra expense for extra carriages, which were to be borne by all the parties jointly. It was also proved that after the adjustment of the accounts at *Palatine*, *Cheesebrough* said that he expected to pay the plaintiffs their proportion of all that was received.

The defendants below then produced the articles of agreement between *Ostrom*, of the one part, and *Wetmore* and *Cheesebrough* and *Baker* and *Swan*, of the other part; by which the parties of the first part agreed with *Ostrom* to run a line of stages from *Albany* to *Schenectady*, and thence to *Palatine*; and *Ostrom* agreed to run a line from *Utica*, to meet the other at *Palatine*. The agreement was dated the 17th of *September*, 1810, and was to be in force for five years. The defendants proved that the line of stages in question was run under that agreement, and that the settlement which had been proved arose out of it. *Cheesebrough* did not sign the agreement; and the defendants' counsel insisted, that the acts and confessions of *Cheesebrough* could not bind or prejudice *Wetmore*, and that all the authority of the person who adjusted the accounts was derived from *Cheesebrough*, so that *Wetmore* could not be bound or concluded by the acts of such an agent; that the agreement being the basis of the settlement, no action would lie for a balance of accounts, unless there was an express promise to pay; and that, on the second count, the *insimul computassent* being the foundation of the *assumpsit*,

it should have been made *within the jurisdiction of the Mayor's Court; that the sealed instrument, being the basis of the action, ought to have been set forth in the plaintiffs' declaration; and that an action of *assumpsit* would not lie to recover the balance which might be found due on a settlement of accounts between the parties. The court below charged the jury, that the plaintiffs were entitled to recover, and the jury found a verdict accordingly. The defendants' counsel tendered a bill of exceptions to the opinion of the court below, on which the writ of error was brought to this court.

Champlin, for the plaintiffs in error.

Lush, contra.

Per Curiam. This was an action for money had and received, and as the money was received in the city of *Albany*, there cannot be a doubt but that the Mayor's Court had jurisdiction of the cause of action, which was the money so received. Here was, in some respects, a joint concern between the plaintiffs and defendants and *Ostrom*, but each party was to have his separate portion of the road, and to furnish his own team, at his own risk and expense. The partnership between the two defendants below was sufficiently proved to charge them jointly with the moneys received, and to charge one with the acts of the other; and, as here was a liquidation of accounts, and a settlement, and a balance struck by a common agent of all the parties, and the sum of one hundred and forty-four dollars found to be specially due from the defendants to the plaintiffs below, the law raised an implied *assumpsit* in them to pay it. There was no partnership existing between all the five persons concerned in running the stage, so as to interfere with this suit. The covenant introduced by the defendants below had nothing to do with this case. It only went to prove that the parties had agreed with each other to run a stage from *Albany* to *Utica*, but with distinct and separate interests and rights. Each party had his distinct share of the road. The judgment below ought, therefore, to be affirmed.

Judgment affirmed.

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WEED

*JOHNSON against WEED AND ANOTHER.

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THIS was an action of *assumpsit* for goods sold and delivered. The cause was tried at the *New-York* sittings, in *June*, 1812, before Mr. Chief Justice *Kent*. The sale and delivery of the goods were admitted. The defendants proved a conversation between *Walter Weed*, one of the defendants, and the plaintiff, from which, the witness testified, he understood the goods were to be paid for in cash; but it was agreed between the parties, that the plaintiff should take the note of *John Townsend*, payable in sixty days, and that the discount on the amount for that time should be added. The plaintiff agreed to take the note in payment, and declared himself per-

A promissory note of a third person, taken for goods sold and delivered, is no payment, unless the vendor specially agrees to take it absolutely as payment. And where a note was taken in payment, and a receipt in full given by

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the vendor, it was held that it was a question of fact for the jury to decide, under all the circumstances, whether there was such a special agreement or not. (a)

And where there was evidence on both sides, and the jury found for the plaintiff, the court refused to set aside the verdict. (b)

fectly satisfied with it, and said that *Townsend* was as good as any man in *New-York*; and from all that was said, the witness understood that the note was to be an absolute payment for the goods. The note of *Townsend* was dated the 21st *November*, 1807, for six hundred and forty-seven dollars, payable to the plaintiff, or order, sixty days after date. *Townsend* stopped payment on the 28th *December*, before the note was due, and was discharged under the insolvent act, passed the 3d *April*, 1811, without having paid the note.

The plaintiff proved that *Walter Weed* came to his house, on the evening of the 21st *November*, 1811, and produced the note of *Townsend* to the plaintiff, who observed that it ought to have been made payable to, and endorsed by, the defendants. *Weed* said it was late in the evening, and his vessel was ready to go to *Albany*, and that it would *make no difference*. The plaintiff then took the note, and gave the defendants a bill of the goods, and a receipt in full, at the bottom.

The judge charged the jury, that unless the plaintiff agreed to receive the note as payment, and to run the risk of its being paid, the mere taking the note would not amount to a payment, if, before the note became payable, it turned out to be of no value, and the plaintiff might resort to his original demand; and that, whether the plaintiff did or did not take the note in question, under such an agreement, was a matter of fact for the jury to find. The jury found a verdict for the plaintiff, for the amount of the goods sold and delivered.

A motion was made to set aside the verdict, and for a new trial.

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*Foot, for the defendants.

Parker, contra.

Per Curiam. If it was a part of the original agreement between the parties that the plaintiff should take *Townsend's* note, in full satisfaction of the goods sold, so that he, and not the defendants, should run the risk of the note, then, undoubtedly, the plaintiff has no right of action. But the fact, whether such was or was not the agreement, was submitted to the jury, and they have decided in favor of the plaintiff. The books all agree that there must be a clear and special agreement that the vendor shall take the paper absolutely as payment, or it will be no payment, if it afterwards turns out to be of no value. (2 *Ld. Raym.* 929, 930. 1 *Salk.* 124. 7 *Term Rep.* 66. 3 *Johns. Cas.* 72. 6 *Cranch*, 264.) And this rule, requiring such a special agreement, ought to be adhered to, for it is well calculated to prevent fraud and support justice. Was the evidence of the agreement in this case so clear as to call upon the court to set aside the verdict? One witness understood the agreement in that light; yet, when the note was offered in payment, the plaintiff said it ought to have been endorsed by the defendants, and the defendants did not then urge the alleged agreement that they were to take no risk of the note, but removed the objection of the plaintiff, by saying that it would *make no difference*. The terms of the re-

(a) Vide *Schermerhorn v. Laines*, note (a) 7 *Johns. Rep.* 311.

(b) Acc. *Ackley v. Kellogg*, 8 *Coven*, 223. *Douglass v. Tonsey*, 2 *Wendell*, 352. *Smith v. Hicks*, 5 *Wendell*, 48. And see *Hurtin v. Hopkins*, *supra*, 37.

ceipt are not decisive. It might still have been understood, consistently with the words of it, that the note was received in full, under the usual condition of its being a good note; and besides, receipts have always been held open to explanation.

Upon the whole, there was evidence on both sides, and as the justice of the case is as much, if not more, with the plaintiff than the defendants, the court cannot interfere.

Motion denied.

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***JACKSON, *ex dem.* ROGERS AND OTHERS, *against*
POTTER.**

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THIS was an action of ejectment for one hundred acres of land, in the town of *Moreau*, in the county of *Saratoga*. The facts in the case were as follows: *James Rogers*, in his lifetime, was seised in fee of the premises in question, and died so seised, the 3d *November*, 1810, leaving two of the lessors his heirs at law, by *Elizabeth Rogers*, the other lessor. On the 19th *October*, 1805, he made his will, which was duly executed, in which, after devising several farms, there were the following clauses: "Sixthly, I give, devise, and bequeath, unto my son, the said *Walter*, the natural son of the said *Elizabeth*, otherwise *Betsey Arthur*, and unto my son *Charles*, the natural son of my said wife, born before wedlock, and to their several and respective heirs and assigns, the rest, residue, and remainder, of all my real estate, whatsoever and wheresoever the same may be, to be equally divided between them, share and share alike: and I do further give and bequeath unto the said *Walter*, *Charles*, and *Abby*, and to their respective heirs and assigns, all the rest and residue of my personal estate of what nature or kind soever, provided I should die, leaving no other child or children; but in case I should die leaving another child or children, then, and in such case, the said rest, residue, and remainder of such personal estate, I give and bequeath unto the said *Walter*, *Charles*, and *Abby*, and such other child or children, and to their respective heirs and assigns, in each case, to be equally divided between them, share and share alike." The testator did not own the premises at the time of making his will; but acquired the same afterwards. After he became seised of the premises in question, he enclosed the said will in a letter to *Susannah Case*, in the following words: "Mrs. *Case*, enclosed is my will, which you are requested to keep, and, when it becomes proper to open the same, it must be done in the presence of two of the executors, and eight other persons. *James Rogers*." The letter, with the will, was delivered to Mrs. *Case*, who gave the testator a receipt signed and sealed by her. The letter enclosing the will was not attested by any witness. After acquiring the premises, the testator said to one of the executors, named in the will, "I have made my will and deposited it with *Susannah Case*, and

A devise of lands will not pass lands acquired subsequently to the execution and publication of the will. And a republication of a will, so as to affect the after acquired lands, must be made with the same solemnities as the execution of the original will.

Where a person made a will in 1805, devising all his estate, and afterwards became seised of other lands, and in his last sickness, in 1810, declared that he had made a disposition of all his estate, by a will which he had deposited with S., and that he did not wish to alter it, except to add another executor; this was held not to amount to a republication of the will, so as to pass the after acquired lands. (a)

(a) Vide 2 R. & S. sec. 5. *Jackson v. Holloway*, 7 Johns. Rep. 394, and the cases there collected in note (a).

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have appointed you one of my executors, and wish you to accept *the trust. You will find, enclosed in the will, a memorandum in writing, directing the manner of proceeding; which memorandum was made at the time the will bears date. After acquiring the premises, the testator, also, in his last sickness, on the 2d November, 1810, said that he had made a disposition of all his estate, by will, and had deposited the will with *Susannah Case*, enclosing a memorandum directing her how to proceed, which was the same as above stated. He also said, that all the alteration he wished to make in the will was to appoint another executor, and wished *B. J. Clark* to be the person.

H. Bleeker, for the plaintiff, contended, 1. That the premises in question being acquired subsequent to the execution of the will, did not pass by it; (*Jackson v. Holloway*, 7 Johns. Rep. 394. 1 Saund. 277. n. 4. *Peake's Ev.* (384,) 413. 2 Woodeson, 366, 367;) 2. That the facts stated in the case did not amount to a republication. And a revocation or a republication must be attended with the same solemnities as the execution of the will itself. The statute relative to wills is express on the subject. (*Laws*, v. 1. p. 178. sess. 24. c. 9. s. 3, which is the same as s. 6. 29 Car. II. c. 3. 2 R. S. 64. s. 42.)

Skinner, contra, contended, that by the common law the facts stated in the case amounted to a republication. Then does the statute alter the common law in this respect? The statute applies to alterations of a will, not to a republication; and the case of *Jackson v. Holloway* was that of an alteration. The statute, no doubt, intended to prevent any implied revocations and alterations, and to exclude parol evidence of such revocations or alterations. There was no actual alteration of the will in this case. The parol proof would not infringe or militate against any salutary object of the statute; but is consistent with the intent of the statute, and of the will. There is great confusion and contradiction in the *English* decisions on this subject. This court has not decided the point, and is now free to settle it, on principle, unshackled by the authority of *English* adjudications.

Before the statute of frauds, it was necessary that a will should be in writing, to pass lands. The admission of a republication, or of parol evidence, to show that the testator meant to pass the after acquired land, is merely to rebut the legal presumption that he intended only to pass the lands possessed by him at the time of making his will; and parol evidence is always admissible to rebut an equity, or repel a legal presumption. (*Brady v. Cubitt*, Doug. 39. *Skin.* 227. 2 W. Bl. 522. 1 Lord Raym. 144.) Since the statute of frauds, parol evidence has been admitted to rebut a parol revocation, or circumstances amounting to a revocation. An implied revocation *has been put on the ground of "a tacit condition, annexed to the will when made, that it should not take effect if there should be a total change in the situation of the testator's family." (5 T. Rep. 49. 58. *Doe v. Lancashire*, 2 East, 530. 540. *Kennelel v. Scrafton*.)

The parol evidence or republication in this case, operates to give the will effect.

Per Curiam. The law is too well settled to be now questioned, that a devise of lands will not operate upon lands purchased after the execution and publication of the will, unless, subsequent to such purchase or seisin, the devisor republish his will, with the requisite solemnities. And it is equally well settled that the republication of the will, so as to affect the after acquired lands, must be made with like solemnity as the execution of the original will. The statute (*Laws*, v. 1. p. 178) (a) says, that no such will shall be revoked, or altered, but by another writing, executed in like manner, or by destroying it. Here was no such republication, nor does the case come within any of the decisions relative to constructive revocations in law. (See 1 *Saund.* 277, note 4.) The plaintiff is entitled to judgment.

Judgment for the plaintiff.

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v.
SOUTHWICK.

(a) 2 R. S.
64, s. 42.

SPENCER against SOUTHWICK.

THIS was an action for a libel, published by the defendant in the *Albany Register*. The libellous publication, which was set forth in the declaration, with the requisite *innuendoes*, was as follows: "His (meaning the editor of a certain newspaper called the *Albany Republican*) assurance that a considerable portion of his paper shall be devoted to the support of religion, &c. excites in my mind strong suspicions. I beg it may be remembered that by hypocritical cants of this description, Judge *Spencer* and his associates, effected the incorporation of the *Manhattan* bank, in which the judge's share of the profits was several thousand dollars. With this knowledge of the policy of the judge, I cannot but believe that this assurance is calculated to deceive and impose upon mankind. It is a fact of public notoriety, that when the *Manhattan* bill passed the senate, Judge *Spencer* claimed to be a distinguished member of that body. The preamble of the bill stated, that "whereas by the blessing of God, the introduction of pure *and wholesome water into the city of *New-York*," &c. The deception succeeded, and not more than ten members of the legislature knew that the bill contained a clause that would authorize the company to carry on the banking business. It is not a little extraordinary that a similar hypocritical pretence should be resorted to for the purpose of giving currency to a newspaper. It is, to my mind, conclusive evidence, that this artful, deceptive prospectus has a clear right to claim Judge *Spencer* for its legitimate father; whether this attempt at deception will succeed as well as that in relation to the *Manhattan* bank, remains yet to be determined. Of one thing I am certain; it will not put so much money into the judge's pocket. Thus much for the prospectus."

An argumentative plea is good on a general demurrer. Certainty to a common intent is sufficient in a special plea; and this certainty is what, on a fair and reasonable construction, may be called certain, without recurring to possible facts. (a)

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(a) Certainty to a common intent is sufficient in a plea in bar of the plaintiff's action. *Van Ness v. Hamilton*, 19 Johns. Rep. 349. *Rockefeller v. Donnelly*, 8 Cowen, 625. But it should be direct and positive in the facts set forth, stating them with all necessary certainty. *Van Ness v. Hamilton*, ut sup

The defendant pleaded in bar, that before writing, printing

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and publishing the alleged libel, to wit, on the 2d of *April*, 1798, the plaintiff was one of the *senators* from the middle district in this state; and that an act of incorporation was passed by the legislature, entitled, "An act for the supplying the city of *New-York* with pure and wholesome water;" the preamble to which law, and the first section thereof, were in the words following, (setting forth the preamble and first section,) and which law also contained the following clause. "8. *And be it further enacted*, that it shall and may be lawful for the said company to employ all such surplus capital as may belong, or accrue to the said company, in the purchase of public or other stocks, or in any moneyed transactions, or operations, not inconsistent with the constitution and laws of this state, or of the *United States*, for the sole benefit of the said company."

And the defendant averred, that at the time of passing the said law, to wit, on the 1st of *April*, &c. the plaintiff, as one of the senators of the middle district, advocated and supported the same, well knowing, at the same time, that the said law contained a clause to authorize the said company to establish a bank, and to carry on banking business; and the defendant further averred, that at the time the said law passed, but a very small portion of the members of the legislature, to wit, not more than ten, knew that the said law authorized the said company to establish a bank, and to carry on banking business; and the defendant further averred, that he had good reason to believe that the plaintiff well knew that a large majority of the members of both branches of the legislature were totally ignorant that the said law authorized the said company to establish a bank, and to carry on banking *business, at the time the same was passed as aforesaid, and that the plaintiff did not, in a public manner, publish and make known to the members of the senate, all the powers granted to the aforesaid company, by the said law, as it was his bounden duty, as senator, to have done; and the defendant further averred, that at the time and place, &c. the plaintiff held, and was owner of, a large portion of the stock created by the said law, to wit, the sum of 5,000 dollars, and that he made a large profit thereon, to wit, the sum of five hundred dollars, all which actings and doings of the plaintiff, &c. the defendant averred were hypocritical and deceptive, and contrary to his duty as one of the senators, &c. and which the defendant is ready to verify, &c.

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To this plea the plaintiff demurred, and the defendant joined in demurrer.

Parker and *Skinner*, in support of the demurrer, contended, that the plea was argumentative, and by way of rehearsal. It should have stated the facts in positive and direct terms. It is intended as a bar to the whole declaration, and it does not meet the charge of the plaintiff. (1 *Saund.* 28. n. 3. 1 *Chitty's Plead.* 510. 518, 519.)

If a member of the legislature approves of a bill, it is sufficient for him to vote for it. He is not bound to give his reasons, or to explain his understanding or construction of

its language and meaning. The demurrer admits only what is well pleaded.

Foot, contra, insisted, that by the demurrer, not only the facts, but all reasonable and fair inferences from those facts, were admitted. It was like a demurrer to evidence. (5 *Johns. Rep.* 28. 2 *H. Bl.* 205.) It was not necessary for the defendant, in his justification, to prove the facts literally true. It is enough if he proves them substantially. (7 *Johns. Rep.* 264. *Croswell v. Thomas*, 1 *Johns. Cases*, 279.)

KENT, Ch. J. (*absente* SPENCER, J.) delivered the opinion of the court. The gist of the libel consists in charging the plaintiff with hypocrisy, and a want of fidelity in his trust, as a senator, in effecting the incorporation of the *Manhattan* company, in which he was largely and profitably interested. The plea in justification of the charge states, that the plaintiff was a senator at the time of the passage of the bill, and that he advocated and supported it, and was, at the time, largely interested in its stock, and on which he made a great profit; that he knew that the bill contained a clause giving power to institute a bank, and that only a very small portion of the *legislature, not exceeding ten in number, knew of that fact, and that the plaintiff had good reasons to believe that he well knew that a large majority of both houses were totally ignorant of the fact, and that he did not disclose and make it known to the senate. To this plea the plaintiff put in a general demurrer, and the question is, whether the facts in the plea are not sufficiently averred, and whether they do not amount to an answer to the whole charge contained in the declaration. We cannot perceive any charge in the libel to which the plea is not a substantial answer, provided the plaintiff's knowledge that the legislature were ignorant of a banking power lurking in the bill be sufficiently averred.

That knowledge is averred only by way of argument and inference, and not directly, and the plea would, therefore, have been bad on special demurrer. A plea should be a statement of facts, and not of argument. But an argumentative plea is good on general demurrer. (*Com. Dig.* tit. *Pleader*, E. 3. *Bac. Abr.* tit. *Pleading*, I. 5. *in notis.*) The plaintiff's knowledge, in this case, is argumentatively stated. Certainty to a common intent is sufficient in a special plea; and certainty even to a certain intent, according to Mr. Justice *Buller*, means that which, upon a fair and reasonable construction, may be called certain, without recurring to *possible* facts; for when words are used which will bear a natural sense, and also an artificial one, or one to be made out by argument, or inference, the natural sense shall prevail. (*Buller*, J. in *King v. Lyme*, *Doug.* 159, and *Dovaston v. Payne*, 2 *H. Bl.* 530.) It is possible that the plaintiff might have had good reasons to believe, and yet not have believed; and that he might have had good reasons to believe that he well knew, and not have well known, or even imperfectly known, the truth before him. The force of any impression to be made upon the

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mind, from the operation of good reasons to be presented to it, will undoubtedly depend, in some degree, upon the character and discipline of that mind, and the existence of passions and biasses which may impede or facilitate the progress of truth. But I cannot conceive that any person of a sound and intelligent understanding can have *good reasons to believe that he well knows a fact*, and yet not feel and act under the influence of that impression. To a common intent, and upon a reasonable construction, that averment charges the plaintiff with knowledge of the fact, not, indeed, directly, but argumentatively. When a man has good reasons to believe that he well knows a fact, it amounts to *notice* of the fact sufficient to *charge him with a knowledge of it, and to hold him responsible, not only as a moral agent, but in law, for the consequences of such knowledge.

The court are, accordingly, of opinion, that the defendant is entitled to judgment, with leave, nevertheless, to the plaintiff to withdraw his demurrer and reply, on the usual terms.

Judgment for the defendant.

JACKSON, *ex dem.* SCHERMERHORN AND OTHERS,
against MURCH.

To ascertain the true east line of the Cambridge patent, the sixth course in that patent is to be run to the most westerly corner of the Walloomschack patent, ascertained by running two courses from the house of Gerrit Cornelius Van Ness, and the seventh course in the Cambridge patent, must be run from the terminating point of the sixth course thus ascertained, north, 1,092 chains, to the middle of the Battenkill, &c.

THIS was an action of ejectment, for the recovery of eighty-eight acres of land, part of lot No. four in *Schermerhorn's* patent. The cause was tried at the *Washington* circuit, in 1811. An exemplification of a patent to *Ryer Schermerhorn* and others, dated the 11th of *May*, 1762, was read in evidence. The tract of land granted is described as lying east of a tract of land granted to *Isaac Sawyer, Edmund Wells*, and others, "Beginning at a *sweet maple tree*, standing by the side of an inlet of water, near *Battenkill*, which said tree was marked for the north-east corner of the aforesaid tract granted to *Isaac Sawyer, Edmund Wells*, and others, and runs from the said maple tree along the bounds of the last mentioned tract, south seven hundred and twenty chains, then easterly," &c.

The lessors of the plaintiff are the owners of *Schermerhorn's* patent, and the defendant is part owner of the patent granted to *Isaac Sawyer* and others, called the *Cambridge* patent; and the only point in dispute between the parties was the true east line of the *Cambridge* patent.

In a deed of partition among the patentees of *Schermerhorn's* patent, bearing date the 22d of *September*, 1764, lot No. one, in the subdivision of the tract, is described as "beginning at a certain marked maple tree, standing on the side of an inlet of water, in the north-east corner of land granted to *Isaac Sawyer* and others, and running thence south ninety-two chains and fifty links east," &c. Lot No. four is described as commencing at the south-east corner of lot No. three, which is described as being on the west line, or first corner of the *Schermerhorn* patent.

James Mallery, a surveyor, testified, that he run the west line of lot No. four, and that he commenced his survey at a tree corresponding *with a tree described in *Schermerhorn's* patent, as the place of beginning, and traced the west line of that patent to the south-west corner of lot No. four; that he allowed for the variation of the compass, and run his course south one degree eighteen minutes east; from the maple tree he run south three hundred and five chains, and a fence corresponded with the line he so run, for the distance of sixty chains; thence he run to the end of the three hundred and five chains through cleared fields, and found no line: he found a marked tree two chains east of the line run by him, and on *boxing* it, he found the mark to be forty-six or forty-seven years old; that on running the south and north lines of lot No. four, he found marked trees, corresponding at right angles with the south line as run by him.

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The defendant produced an exemplification of a patent, called the *Walloomshack* patent, the boundaries of which were described as "beginning at a certain marked tree, which is one hundred and forty-seven chains distant from the late dwelling-house of *Gerrit Cornelius Van Ness*, measured on a line running south seventy-five degrees east from the south-east corner of the said bound to the said tree; thence north thirteen degrees, thirty minutes, west ninety chains and forty links," &c.

An exemplification of the *Cambridge* patent, dated the 23d of *July*, 1761, to *Isaac Sawyer* and others, was introduced, the boundaries of which were thus described: "Beginning at a large water maple tree marked with a turtle, standing one hundred and twenty chains measured on a course north twelve degrees east distant from the south-east corner of certain lands granted to *Peter Schuyler* and others, commonly called the *Saratoga* patent, and ten chains to the southward of a place, where a line running north twelve degrees east from the said maple tree crosses a creek called *Pohquampeack*, and this tract runs from the said maple tree north sixty-seven degrees east two hundred and ninety chains; eighty-seven degrees east seventy-two chains; then south seventy-four degrees east one hundred and sixteen chains; then south fifty-seven degrees east one hundred and thirty-eight chains; then south forty-six degrees, thirty minutes, east eighty-eight chains; then south thirteen degrees east one hundred and seventy chains, to the most westerly corner of a certain tract of land called *Walloomshack*, granted to *Edward Collins* and others; then north 1,092 chains to the middle of *Battenkill*; then westerly down the stream; and then southerly, along the *Saratoga* patent, to the place of beginning."

George Webster, a witness for the defendant, testified, that he was a surveyor, and that last summer he run the east line of the *Cambridge* patent. He commenced at the south-east corner of the house mentioned in the *Walloomshack* patent, and run the *two first courses and distances as specified in

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that patent ; that assuming the termination of the second course as the most westerly corner of the *Walloomschack* patent, he run a course thence north (allowing one degree, thirty minutes, variation) until he passed lot No. four, of *Schermerhorn's* patent ; that the line run by *Mallery*, as the west line of lot No. four, was twenty-four chains west of the line run by him as the east line of the *Cambridge* patent.

On his cross-examination, he said, that the point assumed by him as the most westerly corner of the *Walloomschack* patent was in a meadow where there was nothing to designate it ; and was very considerably within the bounds of the *Hoosick* patent ; and that he had traced the courses and distances of the south boundary of the *Cambridge* patent, as specified in the grant ; that the south line of the *Cambridge* patent cannot be closed, so as to bring it to the point assumed by him as the most westerly corner of the *Walloomschack* patent, without disregarding the last course and distance given in the patent, which is south thirteen degrees east one hundred and seventy chains, and running a course south twenty-four degrees east one hundred and seventy chains and fifty links. That from the termination of the courses and distances on the south boundary of the *Cambridge* patent, according to the words of the grant, to the place assumed by him as the most westerly corner of the *Walloomschack* patent, is north sixty-five degrees east thirty-four chains and ninety-five links ; that a line run due north from such termination to *Battenkill*, would, when opposite to lot No. four, in *Schermerhorn's* patent, be very considerably west of the line run by *Mallery*, as the west line of the said lot ; that the line run by the witness corresponded to a line called *Campbell's* line, and that run by *Mallery* to a line called *Bleecker's*.

Another witness testified, that twenty-four years ago the defendant went into possession of a farm, which he bought of one *Smith*, under the *Cambridge* patent ; that the defendant's present house is east of *Bleecker's* line ; that the witness bought lot No. thirteen, in the east tier of lots in the *Cambridge* patent, and possesses up to the *Bleecker* line.

A witness for the plaintiff testified, that he assisted *John R. Bleecker*, in 1763, in surveying the patent granted to *Schermerhorn* and others ; that a few days before the trial, he saw the tree standing by a cove, or inlet of water, on *Battenkill*, at which they commenced their survey of the west line of the said patent ; and that when they commenced the survey, *John R. Bleecker*, the surveyor, and *Abraham Jacob Lansing*, two of the patentees of the *Cambridge* patent, and *Ryer Schermerhorn* and *Jacob Schermerhorn*, two of the patentees of the *Schermerhorn* patent, were present ; and the said tree was recognised by the persons present, and marked as the corner tree between the two patents. This evidence was objected to, but admitted by the judge. A letter from *John R. Bleecker*, dated the 28th November, 1765, directed to two patentees of the *Cambridge* patent and a patentee of the

Schermerhorn patent, though objected to, was read in evidence. In this letter, *Bleecker* stated that the *sixth* course of the *Cambridge* patent was south thirteen degrees east one hundred and seventy chains, which he assumed to be the westerly corner of the *Walloodschack* patent, and made a return accordingly to the surveyor-general; and that the corner so assumed will agree with the corner made for *Sawyer's* tract on the south side of *Battenkill*, being a sweet maple, which stands on a direct north course from the place first mentioned; that *Abraham J. Lansing* was present when he marked the maple tree standing on the side of an inlet of *Battenkill*, in the bound of the *Cambridge* patent; and was present also when he commenced the survey of the *Schermerhorn* patent; and that he run a due north line from the maple tree to *Battenkill* across a neck of land, and *Lansing* and *Schermerhorn* marked a tree.

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A witness for the plaintiff testified, that when *A. J. Lansing*, the owner of lot No. twenty-one, in the north-east corner of the *Cambridge* patent, sold that lot, he sold only to *Bleecker's* or *Schermerhorn's* line: at that time, being forty years ago, one *Cloughy* was in possession, under the *Schermerhorn* patent, up to *Bleecker's* line. *Lansing* offered to sell the land between the two lines, but *Cloughy* refused to purchase, and continued in possession up to *Bleecker's* line, which possession was continued, under *Cloughy*, down to about fifteen years since, when the occupier bought the claim of one *Smith*, a *Cambridge* patentee. Another witness testified, that he was in possession of land in lot No. four, in *Schermerhorn's* patent, which he held under *Dan. Kellogg*, who had a lease from the *Schermerhorns*; and that he possessed up to *Bleecker's* line, and continued in possession about ten years, during which time the defendant never claimed any right east of *Bleecker's* line; that one *Sage*, who possessed the land adjoining, under the same title, held to the *Bleecker* line.

Another witness testified, that twenty years ago, he assisted *Sage* in cutting wood on lot No. four, within fifty-one rods east from the dwelling-house of the defendant, and to about twenty rods east of his present *dwelling, and the defendant did not claim the land, or forbid *Sage* to cut and carry away the timber.

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The judge expressed his opinion that the defendant was entitled to a verdict; and the plaintiff, thereupon, submitted to a nonsuit, with leave to move the court to set it aside, and for a new trial.

A motion was now made to set aside the nonsuit, and for a new trial, which was argued by *Wendell*, for the plaintiff, and *Crary*, for the defendant.

Per Curiam. The judge expressed an opinion at the circuit, that the defendant was entitled to a verdict. This opinion having been submitted to then, the court is now called upon to review it, and to determine whether the jury would not have been warranted in deciding in conformity to it.

The only question for our consideration relates to the running of the *seventh* course in the *Cambridge* patent. It is to

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v.
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be run from the most westerly corner of the *Walloodschack* patent, ascertained by running two courses from the site of *Gerrit Cornelius Van Ness's* dwelling-house; or is that course to be run from the termination of the *sixth* course of that patent, ascertained by running the previous courses and distances, without reference to the *Walloodschack* corner? We are of opinion that, as the sixth course in the *Cambridge* patent calls for the most westerly corner of the *Walloodschack* patent, that corner being ascertained by running two courses from *Van Ness's* dwelling-house, must be the point to which the sixth course in the *Cambridge* patent is to be run, and that the seventh course, north 1,092 chains to the middle of *Battenkill*, must be run from the terminating point of the preceding course thus ascertained.

Van Ness's house is precisely shown, and although there is no monument to be found at this day, designating the most westerly corner of the *Walloodschack*, it is fairly inferrible, from the facts in the case, that *Campbell's* line, run between forty and fifty years ago, was run from a monument then existing, and well known as such corner. The principle that a course and distance shall be rejected, when a monument is to be run to, applies to the point now under consideration. That principle is founded on the facts, that compasses vary, that surveyors are liable to mistake, and that, in the progress of settlement, as lands are cleared, obstructions removed, there would scarcely ever be a correspondence *in the length of chain between a survey at the granting of a patent and a resurvey after a lapse of years. The monument is preferred for the greater certainty; and, on the same principle, as it requires, in this cause, but two courses to be run from *Van Ness's* house to ascertain the most westerly corner of the *Walloodschack* patent, that point, thus ascertained, is more certainly the true westerly corner, than the point attained after running out six courses in the *Cambridge* patent.

We have been pressed with the circumstance, that the westerly corner of the *Walloodschack* patent is thus found in a meadow, and within the bounds of the *Hoosick* patent. The dates of the *Walloodschack* and the *Hoosick* patents are not stated. We know not, therefore, which is the eldest; but admitting *Hoosick* patent to be the eldest, and that they interfere, that circumstance would not prevent the *Cambridge* patent's running to the corner of the *Walloodschack*, as a point from which to start in the location of that patent. The plaintiff ought not to be allowed to draw an argument, from the non-existence of a known corner of that patent, when, in all probability, the recollection of it has been lost by the lapse of time.

Much stress was placed on the survey of the patent by *John R. Bleeker*, under the inspection and with the assistance of *A. J. Lansing*, they being patentees. There is no evidence in the case that the other patentees ever assented to that line; their number exceeded sixty, and it cannot be contended that

the acts of part of the patentees can control the rights of those who did not assent to that act. So far from their having assented, we find *Campbell's* line, which was contemporaneous with *Bleecker's*, and coinciding with the line run by *Webster* from the most westerly corner of the *Walloodschack* patent, ascertained in the manner already mentioned. That *Campbell's* line was run as the easterly boundary of the *Cambridge* patent, and by the patentees of that patent, cannot be doubted; it is impossible to account for the existence of that line in any other way. When, therefore, we consider that *Campbell's* is an ancient line, that the plaintiff has not shown a single foot of land to have been possessed to the west of that line, for a considerable number of years, and that even such parts as have been possessed were predatory possessions, we cannot but consider the opinion given at the trial as correct, and we accordingly deny the motion.

Motion denied.

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CAULKINS
v.
HARRIS.

*CAULKINS AND OTHERS, EXECUTORS OF ALBEE, *against*
HARRIS.

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THIS was an action of covenant, brought on a covenant contained in a deed from the defendant to the testator, dated the 20th *August*, 1796, by which the defendant, for the consideration of five hundred dollars, conveyed part of a lot of land, No. sixty-three, in *Aurelius*, to the testator, and covenanted that, at the date of the deed, he was lawfully seised in his own right, as of a good, sure, perfect, absolute and indefeasible estate of inheritance in fee-simple, in the premises, &c. and had good right, &c. to convey, &c. The plaintiffs in their declaration assigned breaches of the covenant. The defendant pleaded *non est factum*. The cause was tried at the *Cayuga* circuit, in *June*, 1812, before Mr. Justice *Spencer*, when a verdict was taken, by consent, for the plaintiffs, for 1,060 dollars damages, being the amount of the consideration money expressed in the deed, with interest; subject to a deduction by the court, if they should be of opinion that the plaintiffs are not entitled to *interest* for the whole time, it being admitted that the testator and his heirs occupied the premises from the date of the deed to this time, but without any valid title from the defendant.

The case was submitted to the court without argument.

Per Curiam. The plaintiffs in this case are entitled to the five hundred dollars, with six years' interest thereon, and no more. This case comes within the rule settled in that of *Staats v. The Executors of Ten Eyck*; (3 *Caines' Rep.* 111;) for the premises appear to have been actually enjoyed, and the mesne profits taken, by the grantee and his heirs. The judgment must, therefore, be for seven hundred and ten dollars, and the costs.

Judgment accordingly.

In an action of covenant, for a breach of a covenant of seisin in a deed, where the grantee had been in the actual enjoyment of the land and taken the mesne profits, for fifteen years, but without any valid title from the grantor; it was held that the grantee was entitled to recover the consideration money, and the interest thereon, for six years only, and the costs. (a)

(a) Vide *Gulrie v. Pugsley*, 12 *Johns. Rep.* 126. *Bennet v. Jenkins*, 13 *Johns. Rep.* 50. *Pitcher v. Livingston*, 4 *Johns. Rep.* 1. *Wager v. Schuyler*, 1 *Wendell*, 553.

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STEVENS

v.

WOOLSEY.

A discharge under the insolvent act of this state is a bar to all suits brought in this state, upon antecedent contracts wherever made.

(a)

(a) Cont.
Hicks v. Hotchkiss, 7 Johns. Ch. Rep. 297.
Wilt v. Follett, 2 Wendell, 457.
M'Millan v. M'Niel, 4 Wheat. 209.
Vide *White v. Canfield*, 7 Johns. Rep. 118.
note (a.)

*PENNIMAN against MEIGS.

THIS was an action of *assumpsit*, brought on a promissory note given in the state of *Connecticut*. The plaintiff formerly resided in *Albany*; but, a short time before the note was given, removed to the state of *Rhode Island*, where he has since resided.

The defendant, after giving the note, obtained his discharge, on the 12th of *November*, 1811, under the insolvent act of this state. The plaintiff did not assent to the proceedings, nor has he received any dividend of the defendant's estate.

A verdict was found for the plaintiff, subject to the opinion of the court, on the above case. And it was agreed, that if the court should be of opinion that the discharge of the defendant defeated the plaintiff's right of recovery, a new trial should be granted, with costs to abide the event of the suit.

Per Curiam. There can be no doubt but that we are bound to consider a discharge under the insolvent act of *this state*, as a bar to all suits brought *here* upon antecedent contracts, wherever made. The statute is peremptory and binding on our courts. We cannot afford the party any other or further remedy than what our laws have prescribed. It was for the wisdom of the legislature to say whether foreign contracts should be exempted from the operation of our insolvent act, but they have not made any such exception. A new trial is, therefore, granted, with costs to abide the event of the suit.

New trial granted.

STEVENS against WOOLSEY AND OTHERS.

A soldier in the revolutionary war, entitled to a lot of land, as bounty, died prior to the 27th March, 1783,

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before the statute of descents. On the 1st July, 1808, his brothers and sisters, his next of kin, except *Henry*, the eldest brother, executed a deed for the land to *B.*, *Henry*, the eldest brother, had previously conveyed the lot to *C.* who was in possession under the deed, at the time of the

THIS was an action of covenant, on a covenant in a deed, executed by the defendants to the plaintiff, dated the 16th of *July*, 1808, for lot No. nine, in the township of *Scipio*, for the consideration of two hundred dollars, in which were the usual covenants of *seisin* and warranty. The defendant pleaded *non est factum*. It appeared *that *Jacob Spilsbury*, a soldier, was entitled to the lot of land. He died before the end of the revolutionary war, leaving the defendants, his brothers and sisters, and *Henry*, who was the eldest brother, his next of kin.

Henry, the eldest brother, conveyed the premises in question to *William Van Ostrum*, who was in possession, under that deed, at the time of the execution of the deed by the defendants to the plaintiff.

A case containing the above facts was submitted to the court; and it was agreed, that if the court should be of opinion that the plaintiff was entitled to recover, a judgment should be entered against the defendants for the sum of two hundred dollars with interest from the 16th of *July*, 1808, to the time

of judgment; otherwise, a judgment of nonsuit was to be entered.

Per Curiam. There could not be a doubt of the plaintiff's right to recover, if it were not for the provision in the eighth section of the act of the twenty-sixth session, c. 88.(a) As the soldier, in this case, died before the end of the revolutionary war, he must have died previous to the 27th of *March*, 1783, and so far the case is within the provision of the act; but the date of the deed from the elder brother is not stated. It only appears that the lands are held under a purchase from the elder brother, who was, independent of the statute, the heir at law, and that the lands were so held, *at the time of the execution of the deed by the defendants*. It lay with the defendants to bring themselves within the special provision of the act; and the court is not, by *intendment*, to help the claim exercised by the defendants, in opposition to the title of the presumptive heir at law, and of a *bona fide* purchaser, holding under him at the time.

Judgment for the plaintiff.

(a) That act (sect. 1) declares that all lands heretofore granted by letters patent, to officers and soldiers serving in the line of this state, in the army of the *United States*, in the late war with *Great Britain*, and who died previous to the 27th *March*, 1783, shall be, and are thereby declared to have been vested in the said persons at the time of their deaths respectively. And the eighth section declares that the rules of descent, established by the act, &c. passed the 23d *February*, 1786, shall apply to, and govern in, all the cases provided for by the first section of the act, except where the lands specified in any letters patent therein mentioned, or any part thereof, are held by *bona fide* purchasers or devisees, under any person or persons who would have been heirs at law of the patentees, if that provision had not been made. (Vide 3 R. S. 195. sec. 1. *Id.* 193. sec. 7. Act, 8th *April*, 1813. *Jackson v. Phelps*, 3 *Caines' Rep.* 62.)

fae purchaser holding under him at the time.(a)

(a) Vide *Jackson v. Winslow*, 2 *Johns. Rep.* 80. *Jackson v. Mumford*, 9 *Cowen*, 254.

WATTLES against LAIRD.

THIS was an action of debt on a recognizance of bail. In *August*, 1809, the plaintiff, as endorsee of a promissory note made by *E. B. Cornwell* and *Leonard Barton*, payable to *Thomas Stage*, or order, brought an action against *Stage*, as the endorser, and in *November* following, the defendant became *special* bail for *Stage*, in that action. The plaintiff recovered judgment against *Stage* in *August*, 1810, and, in the same term, recovered judgment also in a suit against *Cornwell* and *Barton*, the makers. A *fi. fa.* was issued on the last judgment, which was returned, at the next term, satisfied. A *ca. sa.* was issued on the judgment against *Stage*, which was returned *non est*, in *January*, 1811, and the present suit, on the recognizance against the defendant, was commenced in *February*, 1811.

The defendant pleaded *nul tiel record*; payment by *Stage*, the principal, and a set-off of money had and received by the plaintiff to the use of the defendant.

The plaintiff replied *no payment*, and that he did not owe the money pleaded as a set-off.

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v.
LAIRD.

conveyance to *B.* In an action of covenant brought by *B.* against the grantors in his deed, for a breach of the covenant of seisin, it was held that the plaintiff was entitled to recover, the defendants not having shown that they came within the special provision of the 8th section of the act, (*sess.* 26. c. 88,) passed *April* 5th, 1803, and the court would not, by intendment, help the claim of the defendants, in opposition to the title of the presumptive heir at law, and of a *bona fide* purchaser holding under him at the time.(a)

Separate suits were brought by the endorsee of a promissory note against the endorser and maker. In the suit against the endorser *A.* became *special* bail. The plaintiff recovered judgments in both suits, in *August*, 1810, and *fi. fa.* issued against the maker, was returned in *November*, 1810, satisfied. A *ca. sa.* was issued against the endorser, and returned *non est* in *January*, 1811. In an action of

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v.
BIRDSALL.

debt on the recognizance of bail his bail pleaded payment and a set-off of the amount paid by the drawers, as money received to his use.

It was held that the recognizance being forfeited, the matters pleaded by the defendant could

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not be set up in bar to the suit on the recognizance, in which a judgment must be given for the penalty; but the defendant might show the payment by the makers, in mitigation, so that the damages should be assessed for the costs only of the suit against the principal; or judgment *pro forma* might be entered for the penalty, and execution taken out for such damages and the costs of the suit on the recognizance. (a)

It was agreed, on a case containing the above facts, that if the court should be of opinion that the defendant, under the pleadings, could give in evidence, at the trial, and avail himself of the money collected by the plaintiff of *Cornwell* and *Barton*, then judgment should be entered for the plaintiff for twenty-four dollars and ninety-one cents, being the amount of the costs in the suit against *Stage*. Or, if the court should be of a different opinion, then a judgment should be entered for the plaintiff, for his debt as declared for; and that he should collect on the execution to be issued on such judgment, the sum of twenty-four dollars and ninety-one cents; the interest thereon, and the costs of this suit.

Per Curiam. The defendant could not, by pleading, set up any of the matters stated in the case, in bar of the suit on the recognizance. The recognizance was strictly forfeited by the return of *non est* to the *ca. sa.* and the recovery of the principal debt in another suit would not discharge the defendant, or his principal, until *the costs of the suit against his principal were also paid. It is for those costs that the plaintiff must have proceeded in this suit. When he came to have his damages assessed upon the recognizance, the defendant might undoubtedly have given in evidence, in mitigation, the recovery of the debt; and the assessment would then have been only for the costs of the suit against *Stage*; but the judgment would still have been, *pro forma*, for the penalty of the recognizance, and the plaintiff would be entitled to levy on his execution the costs of this suit, and the damages so assessed. Judgment, therefore, must be entered for the plaintiff, according to the latter alternative in the case.

Judgment accordingly.

(a) Where the bail were held to have been discharged by an agreement between the plaintiff and defendant, yet having been fixed at law by a suit on the recognizance, it was held that, as the remedy at law was doubtful, a court of equity might grant a perpetual injunction. *Rathbone v. Warren*, 10 Johns. Rep. 587. Vide *Clark v. Niblo*, 6 Wendell, 236, S. C. 3 Wendell, 24. Where it was held that a similar agreement might be pleaded in bar of the action on the recognizance. See also *Mechanics' Bank v. Hazard*, 13 Johns. Rep. 353.

SMITH against BIRDSALL.

A sheriff is entitled to his reasonable fees and expenses for bringing up a former sheriff, on an attachment for a contempt in not returning process.

THIS was an action of trespass on the case. The plaintiff's demand was for fees and expenses in arresting, taking and carrying the defendant from the town of *Junius*, in the county of *Seneca*, to the city of *Albany*, while he, the plaintiff, was sheriff of that county, on an attachment issued out of this court against the defendant, for a contempt, in not returning an execution issued from this court, and delivered to the defendant to be executed, while he was sheriff of the county of *Seneca*.

The fees and expenses charged by the plaintiff against the defendant were as follows:

Caption fee,	\$	56
Mileage, 182 miles, at 19 cents,	34	12
Expenses going to and returning from <i>Albany</i> , 12 days, 30 miles per day, at 50 cents,	18	
Two days' attendance in <i>Albany</i> ,	6	
Expenses for two days,	3	
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v.
HATCH.

A verdict was taken for the plaintiff, at the *Albany* circuit, in *April*, 1812, for sixty-one dollars and sixty-eight cents, subject to the opinion of the court, on the legality of the charges demanded by the plaintiff.

Per Curiam. The above charges are reasonable and just, and no more than an indemnity. The defendant appears to have been in contempt, and, consequently, liable to the costs and expenses of the attachment. The *habeas corpus* act allows twelve and a half cents a mile, for bringing up a person, and the charges, also, for taking him back, if remanded. Where the law is silent as to charges for particular services, the court, if they allow any thing, must allow what is reasonable.

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Judgment for the plaintiff.

PALMER against HATCH.

THIS was an action of debt, for the escape of *R. Usher*, a prisoner, from the custody of the defendant, the late sheriff of *Madison* county, on an execution at the suit of the plaintiff. The cause was tried at the *Madison* circuit, in *July*, 1812, before Mr. Justice *Spencer*.

The execution was produced with the return of the sheriff endorsed *cepi corpus in custodia*.

It appeared that the *deputy* of the sheriff arrested *Usher*, on the return-day of the *ca. sa.* and delivered him to the care of two brothers of *Usher*, in whose custody he remained until the next day, the deputy having left him, and gone on other business. *Usher* remained in the place where he was left, with his brothers, until twelve o'clock that night, when he went to his own house with them, and the deputy did not take him to gaol until the next day.

The jury, under the direction of the judge, found a verdict for the plaintiff.

A motion was made to set aside the verdict, and for a new trial, which was submitted to the court without argument.

Per Curiam. After the deputy had arrested *Usher*, he voluntarily left him in custody of his two brothers, in order to go and execute other process. This was leaving the prisoner at large, and was clearly an *escape*; for the two brothers of the prisoner had no authority, after the deputy had left them, to detain the prisoner. The case of *Benton v. Sutton* (1 *Bos. & Pull.* 24) is directly to this point, and the argument appears to be conclusive.

What a deputy sheriff arrested a defendant on an execution and left him in the custody of two brothers of the defendant, and went to serve other process, and did not take him to gaol until the next day, it was held, that this was an escape for which the sheriff was liable; the persons in whose custody the prisoner was left, having no authority to detain him in the absence of the deputy. (a)

(a) Vide *Obstead v. Raymond*, 6 *Johns. Rep.* 62 *Wheeler v. Bailey*, 13 *Johns. Rep.* 306.

Judgment for the plaintiff.

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COOPER

v.

STOWER.

*JACKSON, *ex. dem.* OSTRANDER, *against* ROWAN.

A. agreed to convey land to B. on B.'s paying 100 dollars, at the time of taking possession, and the residue of the purchase money, at future periods, specified in the agreement. B. took possession on the 15th April, 1811, and at the same time paid the 100 dollars to A.

In an action of ejectment brought on the demise of A. dated May, 1811, against B. to recover the possession, it was held that B. was entitled to a notice to quit, before bringing the suit. (a)

THIS was an action of ejectment, tried before Mr. Justice Yates, at the *Washington* circuit, in *June*, 1812. The demise from the lessor was laid on the 1st day of *May*, 1811. The plaintiff gave in evidence a written agreement between the lessor and the defendant, dated the 9th of *April*, 1811, by which the lessor covenanted to give the defendant a warranty deed, in fee, for the premises in question, on the tenth of *July* then next, provided the defendant, on the delivery of the possession, paid the lessor one hundred dollars, and four hundred dollars on the tenth of *July* then next, with interest, and gave a bond and mortgage, to secure the remaining sum of 1,300 dollars, with interest, in several instalments, as specified in the agreement.

It was proved that the defendant took possession of the premises, under the agreement, on the 15th *April*, 1811, and on that day, paid the lessor the one hundred dollars, and has since continued in possession.

The defendant moved for a nonsuit, on the ground that the action could not be sustained, without showing a previous notice to the defendant to quit.

The judge overruled the objection, and a verdict was found for the plaintiff.

A motion was made to set aside the verdict, and for a new trial, which was submitted to the court without argument.

Per Curiam. At the date of the demise, on the 1st of *May*, 1811, the possession of the defendant was lawful, and not tortious. He entered on the premises the 15th of *April* preceding, under an agreement of the lessor to sell. That agreement purported that possession was to be delivered, on the payment of one hundred dollars; and the defendant paid that sum on taking possession under the agreement. He was, consequently, entitled to a notice to quit, or a demand of possession before suit brought, and the case of *Right v. Beard* (13 *East*, 210) is in point. The court are, accordingly, of opinion, that upon this case, a judgment of nonsuit must be entered.

Judgment of nonsuit.

(a) Acc. *Jackson v. Niven*, 10 *Johs. Rep.* 335. Wherever the relation of landlord and tenant exists, or whenever it can be shewn that the defendant entered lawfully into possession, and by the permission of the owner, and has done no act hostile to him, he is entitled to a notice to quit. *Jackson v. Aldrich*, 13 *Johs. Rep.* 111. But the case of vendor and vendee is an exception. The vendor may maintain ejectment against the vendee without a previous notice, though the latter entered into possession under a contract of purchase, with the consent of the former. *Jackson v. Miller*, 7 *Cowen*, 747. Vide *Jackson v. Stackhouse*, 1 *Cowen*, 122.

[*331] *COOPER *against* STOWER, IMPEADED WITH OTHERS

A contract to sell and convey land, upon the performance of certain acts, to be performed by the purcha-

THIS was an action of trespass, for cutting and carrying away timber from the plaintiff's land. The plaintiff's declaration contained four counts. The defendant pleaded, 1. Not guilty; 2. *Liberum tenementum*, with a notice of special matter to be given in evidence at the trial.

The cause was tried before Mr. Justice *Yates*, at the last circuit in *Clinton* county.

The plaintiff proved that the defendant, in the years 1810 and 1811, cut from the lot of land in question, 500 spars, worth two dollars each, and 30,000 feet of square timber, worth from twenty to twenty-five dollars per thousand, being the estimated value of the timber while standing.

The title of the plaintiff to lot No. seven, which included the land on which the timber was cut, was admitted. The witnesses stated that the land was of little or no value, without the timber.

The defendants gave in evidence, a written agreement between the plaintiff and defendants, *Thomas Stower*, *Jonathan Lynde*, and *A. Bonney*, dated in *December*, 1809, by which the plaintiff covenanted and agreed to sell to the said defendants lot No. seven, in the town of *Peru*, in the county of *Clinton*, for the sum of 1,275 dollars, payable in four equal payments, the first to be made on the 1st *March*, 1810, the second on the 1st *October*, 1810, the third on the 1st *October*, 1811, and the fourth on the 1st *October*, 1812, the three last payments bearing interest; that if the defendants should pay the plaintiff 1,275 dollars, in the manner mentioned, with interest, and also all taxes, charges and assessments on the land, *then*, and in that case, the plaintiff covenanted and agreed to convey to the defendants the said lot.

The defendants also gave in evidence, an agreement executed by *Stower* alone, dated in *December*, 1809, by which he acknowledged to have received from the plaintiff a contract executed by the plaintiff, and the counterpart thereof, (stating the substance of the contract,) and also a bond, conditioned for the payment of the said sums, to be executed by himself and the said *Lynde* and *Bonney* to the plaintiff; the counterpart of the contract and the bond, as soon as they should be executed by the said *Lynde*, *Bonney*, and himself, the defendant, *Stower*, promised to *return to the plaintiff; and that the same should be executed as soon as the defendant returned to *Essex* county. The defendant further promised and agreed, that *until the said contracts and the said bond were executed by himself and Lynde and Bonney, no timber should be cut on the said lot*, by or under the authority or direction of them.

The contract and bond were executed by the defendants, *Lynde* and *Bonney*, according to the agreement of *Stower*, and were returned to the plaintiff, by the next mail.

It did not appear that any part of the purchase-money had ever been paid.

The defendants rested their defence on the ground that a *license to enter* was to be inferred from the contract.

A verdict was taken for the plaintiff, for 1,600 dollars, by consent, subject to the opinion of the court on a case containing the facts above stated.

The case was submitted to the court without argument.

Per Curiam. A contract to sell and convey land, upon the performance of certain acts, thereafter to be performed, does

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ser at a future period, does not, of itself, contain a license to enter; much less a license to enter and commit waste, by destroying the timber; nor does an agreement made with one of several purchasers, that *until* all of them had executed the contract of purchase, and a certain bond for the performance of its covenants, "no timber should be cut, on the lot," imply a license to the purchasers, after the contract and bond are executed, to commit waste, by cutting and carrying away the timber.

The most that can be implied by such a contract and agreement, is a permission to the

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purchasers to enter, in the mean time, as tenants at will, and occupy the land in a reasonable manner as tenants at will might lawfully do. (a)

(a) Vide *Erwin v. Olmstead*, 7 Cowen, 229.

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DEDERICK
v.
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not, of itself, contain a license to enter, and especially a license to enter and commit waste, by destroying the timber. Such an inference would be very unreasonable. Upon that supposition, a contract to sell a house and lot, with valuable buildings thereon, would authorize the party to enter, before the happening of the contingency, and pull down the buildings. This very point was decided in the case of *Sufferns v. Townsend*. (*Ante*, 35.) Nor does the covenant from one of the defendants to the plaintiff, executed at the time of the contract, that until the execution of the contract and bond by the defendants, "no timber should be cut upon the lot," contain a license on the part of the plaintiff to the defendants, to commit waste. There were other covenants and provisions in that instrument sufficient to induce the plaintiff to accept of it; and it is not consistent with the due security of real property, and the essential interests of individuals, that so erroneous a license, as the one contended for by the defendants, should be inferred and supported from the mere fact of the acceptance by the plaintiff, of an instrument containing a covenant not to cut timber, until the happening of such an event. To pass a greater interest in land than one to be held at will, the writing creating it must be signed *by the party creating the same*. This is the language of the statute of frauds. The utmost that could be implied, from the contract executed by the plaintiff, and from the contract accepted by him is, that the defendants were at liberty to enter, in the mean time, as tenants at will, and to occupy the land in a reasonable manner as other tenants at will might do. Cutting down the timber, beyond what was requisite for the use and improvement of the farm, was waste, and a determination of the tenancy at will. By withholding a deed, until the payment of the money, the plaintiff meant to hold the land as a security for the debt; and it would cease to be a security, if the defendants might lawfully, under the contract, render the land useless and of no value, by stripping it of all its timber. The contracts in the case must be construed reasonably and consistently with the rights of both parties.

The plaintiff is, accordingly, entitled to judgment.

Judgment for the plaintiff.

DEDERICK *against* LEMAN AND OTHERS, HEIRS OF LEMAN.

A plea to an action of debt on a bond conditioned to pay 77*l.* that the defendant paid the plaintiff 3*l.* 9*s.* 10*d.* which the plaintiff "accepted and received in full payment of the sum mentioned

THIS was an action of debt, on a bond executed by *George Leman*, the ancestor, in his life-time, on the 21st *May*, 1790, for the sum of one hundred and fifty-four pounds, (three hundred and eighty-five dollars,) by which he bound himself, his heirs, &c. in the usual form, to the plaintiff, conditioned to pay seventy-seven pounds, on or before the 1st *October* then next, with interest at *six per cent*.

The defendants, after craving *oyer* of the condition, pleaded that the plaintiff ought not to have and maintain his action, &c.

because, after the making of the bond, and the death of the obligor, the husband of one of the heirs, on the 13th of *February*, 1798, paid to the plaintiff the sum of three pounds nine shillings and ten-pence, equal to eight dollars and seventy-two cents, which sum the plaintiff accepted and received in full payment of the sum of money mentioned in the condition of the bond, and in full of all demands whatsoever. The plaintiff demurred to the plea, and the defendants joined in demurrer; and the same was submitted to the court without argument.

**Per Curiam.* Here was a bond executed in the year 1790, conditioned to pay seventy-seven pounds on a day past, with interest; and the plea is, that the husband of one of the heirs paid to the plaintiff, on the 13th of *February*, 1798, "three pounds nine shillings and ten-pence, which he accepted and received in full payment of the sum in the condition mentioned, and in full of all demands whatsoever." This plea is demurred to; and it is palpably bad, either as a plea of payment, or of accord and satisfaction. The authorities to this point are referred to by the court, in *Watkinson v. Inglesby & Stokes*. (5 *Johns. Rep.* 391.) Judgment for the plaintiff.

(a) In an action on a recognizance of bail, evidence of payment of a less sum than the amount of the judgment is inadmissible under a plea of payment. Nor could the payment of a less sum be pleaded though accepted in full satisfaction. *Mechanics' Bank v. Hazard*, 13 *Johns. Rep.* 353. Vide *Johnston v. Brannan*, 5 *Johns. Rep.* 271. *Boyd v. Hitchcock*, 20 *Johns. Rep.* 76. *Le Page v. McCrea*, 1 *Wendell*, 164. *Booth v. Smith*, 3 *Wendell*, 66.

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in the condition of the bond, and in full of all demands whatsoever," is bad.(a)

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TAFT against BREWSTER AND OTHERS.

THIS was an action brought against the defendant, and *Thaddeus Loomis* and *Joseph Coats*, on a bond dated the 16th of *April*, 1810, by which the defendants, "by the name and description of *Jacob Brewster, Thaddeus Loomis* and *Joseph Coats*, trustees of the *Baptist Society of the town of Richfield*," acknowledged themselves bound to the plaintiff in the sum of 3,600 dollars, to be paid, &c. conditioned, that if the defendants, as trustees of the *Baptist Society of the town of Richfield*, their heirs, &c. should pay the plaintiff the sum of 1,800 dollars, with interest, at the several times therein mentioned, &c. The bond was signed "*Jacob Brewster, Thaddeus Loomis* and *Joseph Coats*, trustees of the *Baptist Society of the town of Richfield*," and sealed by them respectively.

The plaintiff assigned two breaches; 1. That after the making the bond, &c. a large sum of money, to wit, one hundred and twenty-six dollars, being the interest for one year then elapsed, was then due and owing; and, 2. That another large sum of money, to wit, the sum of 1,100 dollars, became due, and was owing to the defendants on the 1st of *June*, 1811, which, with the 126 dollars, was still in the arrear and unpaid. The defendants, after craving oyer of the bond and condition, demurred, and assigned for causes of demurrer; 1.

(a) Vide *Jackson v. Walsh*, 3 *Johns. Rep.* 226. *Munn v. Commission Co.* 15 *Johns. Rep.* 44. *Rathbone v. Budlong*, 15 *Johns. Rep.* 1. *Mott v. Hicks*, 1 *Cowen*, 513. Where one enters into a covenant, though he describe himself as the agent of another, and covenant as such, but sign and seal in his own name, he is liable personally. *Stone v. Wood*, 7 *Cowen*, 453.

In an action of debt on a bond against A., B. & C., who were described with the addition or description of "Trustees of the Baptist Society of the town of R.," and who executed the bond with their individual names and seals, but with that addition, it was held that this was a mere description of persons, and that the defendants were liable in their individual capacity.(a)

Where in a declaration on a bond conditioned to pay several sums of money, at several days, the plaintiff assigned two several breaches

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for the non-
payment of
two several
sums, it was
held bad, on
special demur-
rer, for duplici-
ty.(a)

That the bond was executed by the defendants in a *corporate*, and not in their *individual* capacity; 2. That the declaration was *double*, in assigning two distinct breaches of the condition of the bond; and, *3. That in assigning the breaches, it is not said "according to the statute," &c. The plaintiff joined in demurrer, and the same was submitted to the court without argument.

Per Curiam. The bond must be considered as given by the defendants in their individual capacities. It is not the bond of the *Baptist* church; and if the defendants are not bound, the church certainly is not, for the church has not contracted either in its corporate name, or by its seal. The addition of trustees to the names of the defendants is, in this case, a mere *descriptio personarum*. But there is one special cause of demurrer well taken, and that is, that the declaration is double, in assigning two distinct breaches. Several breaches may be assigned, under the statute, on a bond for the performance of covenants, or other collateral matter; but this is not a bond within the act, for it is a bond for the payment of money only. The case is, therefore, to be governed by the common law rules of pleading, which would not permit the assignment of more than one breach, because one was sufficient to forfeit the bond, and entitle the plaintiff to the penalty. If, therefore, a bond was conditioned to pay several sums of money at several days, a non-payment of any sum would forfeit the bond; and the plaintiff was permitted to assign a breach only of one of the payments, as, otherwise, it would be double; and duplicity is still bad on special demurrer. (2 *Vent.* 198. 1 *Roll. Rep.* 112. *Cro. Car.* 176.) Judgment must, therefore, be given for the defendants, with leave, nevertheless, to the plaintiff to amend on the usual terms.

(a) Vide *Cumpston v. Field*, 3 *Wendell*, 382.

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*MILLER *against* PARSONS.

In an action of covenant, for a breach of the covenant for further assurance contained in a deed, by which the grantor covenanted that he, his heirs, &c. would, at any time, at the reasonable request of the grantee, and at the proper costs and charges of the grantor, make and execute all such further and other reasonable conveyances and assurances, &c. as by the grantee,

THIS was an action of *covenant*. The plaintiff declared for a breach of the covenant for further assurance, contained in a deed, dated 11th *March*, 1811, by which the defendant sold and conveyed to the plaintiff a piece of land in *Cocksackie*, in the county of *Greene*; in which deed the defendant, "for himself and his heirs, &c. covenanted and agreed with the plaintiff and his heirs, &c. that the defendant and his heirs, and all and every other person or persons whomsoever, lawfully or equitably deriving any estate, right, title, dower, jointure or interest, of, in or to the premises, by, from or under, or in trust for him, should and would, at any time or times thereafter, upon the reasonable request of the plaintiff, and at the proper costs and charges, in the law, of the defendant, make, do and execute, all and every such further and other lawful and reasonable conveyances and assurances, in the law, for the better and more effectually vesting and confirming the premises, &c. as by the plaintiff, his heirs, &c. or his or their counsel learned in the

law, should be reasonably devised, advised, or required." And the plaintiff averred, that "*Hannah*, the wife of the defendant, would, on the death of the defendant, have a right of *dower* in the premises so conveyed to the plaintiff; and that after making the deed, &c. the defendant was requested by the plaintiff to make and execute, or cause to be made and executed, at the proper costs and charges of the defendant, in the law, a lawful and reasonable conveyance and assurance, in the law, to the plaintiff of the said right of dower of his said wife, &c. according to the true intent and meaning of the said covenant, &c. Yet the defendant hath not yet made, done and executed, or caused to be made, done and executed, at his proper costs and charges, in the law, a lawful and reasonable conveyance, in the law, of the said right of dower of the said *Hannah*, his wife, contrary," &c.

The defendant, after craving *oyer* of the deed, which contained, besides the covenant for further assurance, the usual covenants of *seisin*, for *quiet enjoyment*, and *warranty*, demurred to the declaration, and the plaintiff joined in demurrer.

The cause was submitted to the court without argument.

**Per Curiam.* There is no sufficient breach assigned. The plaintiff, or his counsel, were to devise the further assurance; and after having done so, the plaintiff was bound to give notice thereof to the defendant. If he devised a *fine* to be levied, he ought to have stated it so to the defendant, as was done in the cases of *Pet v. Cally*, (1 *Leon*, 304,) and of *Goldney v. Curtise*; (1 *Bulst.* 90;) or if he devised and required a *release*, or a *bargain and sale*, he should also have specified it, as was done in *Wye and Throgmorton's Case*. (2 *Leon*. 130.) Whatever the further assurance might be, it must have been reasonably devised, and not differing from the nature and purport of the original bargain. As no particular assurance is specified in the covenant, and none specified by the plaintiff, the defendant could not know what assurance was required. If an assurance *in pais* be advised, the grantee is bound to present it, or give due notice of the nature of it, to the defendant, and allow him a reasonable time to consider of it; for the covenant was, that the defendant should make, or procure, such other assurance as the grantee, or his counsel, should advise. That these steps were requisite to entitle the grantee to his action on the covenant, was clearly held by the court of *C. B.* in *Bennet's Case*. (*Cro. Eliz.* 9.) Judgment must, therefore, be rendered for the defendant. Judgment for the defendant.

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ble conveyances and assurances &c. as by the grantee, his heirs, &c. or his or their counsel, &c. should be reasonably advised or required; it was held, that to entitle the plaintiff to bring his action, he should first have devised the further assurance, and given notice of it to the defendant, speci-

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fying the particular kind of assurance, or have tendered the assurance to the defendant, and allow him a reasonable time to consider of it before bringing a suit; for such assurance must be reasonably devised, and not different, in its nature and purport, from the original bargain.

STURTEVANT AND KEEP against BALLARD.

THIS was an action of trespass. The declaration contained several counts; *quare clausum fregit, de bonis asportatis*, &c.

The cause was tried at the *Courtlandt* circuit, before the *Chief Justice*, in *June*, 1811.

On the 2d *August*, 1810, one *Mecker* obtained a judgment

A., by a regular bill of sale, sold to B. certain articles, being tools of his trade, for the considera-

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tion of a sum of money, paid by B. to A. "And also in consideration that A. was to have the use and occupation of the tools," &c. specified in the bill of sale, "for the term of three months from the date." (The 29th of August, 1810.)

A judgment was obtained by C. against A., the 2d August, 1810, on which a *fi. fa.* was issued and delivered to the sheriff. on the 28th November, 1810, who took the articles, then in the actual possession of A., and sold them to satisfy the execution of C.

It was held, that the sale of the goods to B., unaccompanied with the actual delivery of them, was fraudulent and void, as against C. a judgment creditor.

A voluntary sale of chattels, with an agreement, contained in the deed or out of it, that the vendor may keep possession is, except in special cases, and for special reasons, to be shown and ap-

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proved of by the court, fraudulent and void, as against creditors. (a)

Fraud is a question of law, especially when there is no dispute a-

against *Nicholas Holt*, for three hundred and ten dollars; and a *fi. facias* for one hundred and seventy-seven dollars, on the said judgment, was delivered to the defendant, as *sheriff, on the 28th November, 1810, and on the same day, the defendant went to the shop of *Holt*, who was a blacksmith, and levied on the articles in question, which were *blacksmiths' tools*. On the evening of the same day, the plaintiffs removed the articles from *Holt's* shop to their own store. At the time of the defendant's seizure, *Holt* showed the tools as his property.

The plaintiffs gave in evidence a bill of sale, dated the 29th August, 1810, executed by *Holt*, by which "in consideration of one hundred and two dollars and twenty-five cents, paid to him by the plaintiffs, and also in consideration that he, *Holt*, was to have the use and occupation of certain tools and instruments, therein after mentioned, for and unto the full end and term of three months, next following," he sold and delivered to the plaintiffs the articles in question, which were specified with their prices, in the bill of sale.

The articles were proved to be of the value of one hundred and seventeen dollars and eighty cents.

A witness testified, that he saw the articles sold and delivered by *Holt* to the plaintiffs; that the consideration was thirty-seven dollars in cash, and the residue a debt due from *Holt* to the plaintiffs.

It appeared that one of the plaintiffs had said, that he did not take possession of the articles, because he thought the bill of sale sufficient; that *Holt* owed more than had been paid; and that he did not consider the bill of sale out until the 29th November.

It was proved that in the evening of the 28th November, the defendant forcibly broke open the inner door of the plaintiffs' store, and took and carried away the goods in question.

A verdict was taken for the plaintiffs, subject to the opinion of the court on a case containing the facts above stated. The case was submitted to the court without argument.

KENT, Ch. J. delivered the opinion of the court. This case is not of much moment, in respect to the amount of property, but it is very important, as to the principle involved in the decision.

The facts lie in a narrow compass. *Mecker*, on the 2d of August, 1810, obtained judgment against *Holt*. On the 29th of August, *Holt* sold his goods and chattels (being a quantity of blacksmith's tools) to the plaintiffs, partly for cash, and partly to satisfy a debt due to them. The articles were specified in the bill of sale, and the bill contained an agreement, that *Holt* was to retain the use and occupation of the goods, for the term of three months. *Just before the expiration of the term, and while the goods continued in possession of *Holt*, they were seized by the defendant, as sheriff, by virtue of an execution issued on the judgment in favor of *Mecker*.

The question arising upon this case is, whether the sale to

(a) Vide *Beale v. Guernsey*, 8 Johns. Rep. 446. *Bissell v. Hopkins*, 3 Cowen, 166. *Jennings v. Carter*, 2 Wend. 446. *Bufts v. Swartwood*, 2 Cow. 431. *Stutson v. Brown*, 7 Cow. 732, and *Archer v. Hubbell*, 4 Wen. 514, in most of which cases the doctrine of *Sturtevant v. Ballard* is expressly recognized.

the plaintiffs, under the above circumstances, was valid in law, as against the judgment creditor.

As between the parties to it, a sale of chattels unaccompanied by possession, may be valid. It may even be valid as against a creditor, who was knowing and assenting to the sale. It was so ruled in *Steel v. Brown and Pary*, (1 *Taunt.* 381,) but this is not such a case. Here was a judgment creditor affected by the sale.

The statute of 13 *Eliz.* and which has been re-enacted with us, (*sess.* 10. c. 44. s. 2,) (a) makes void all grants, and alienations of goods and chattels, made with intent to delay, hinder and defraud creditors. This statute, as it has been frequently observed, by the *English* judges, was declaratory of the common law; and the true principles of law, in relation to such sales, are to be found in a series of judicial decisions, both before and since the statute of *Elizabeth*. The great point is, whether the fact of permitting the vendor to retain possession of the goods, did not render this sale fraudulent in law, notwithstanding such permission was inserted in the deed as a condition of the contract. If there had been no such insertion, but the sale had been absolute on the face of it, and possession had not immediately accompanied and followed the sale, it would have been fraudulent, as against creditors; and the fraud, in such case, would have been an inference or conclusion of law, which the court would have been bound to pronounce. This is a well settled principle in the *English* courts. It is to be met with in a variety of cases, and especially in that of *Edwards v. Harben*; (2 *Term Rep.* 587;) and it has been recognised and adopted by some of the most respectable tribunals in this country. (*Hamilton v. Russell*, 1 *Cranck*, 309. *Davies v. Cope*, 4 *Binn.* 258.) But it by no means follows that such a sale, with such an agreement attached to it, and appearing on the face of the deed, is necessarily valid. There must be some sufficient motive, and of which the court is to judge, for the non-delivery of the goods, or the law will still presume the sale to have been made with a view to "delay, hinder or defraud creditors." Delivery of possession is so much of the essence of the sale of chattels, that an agreement *to permit the vendor to keep possession, is an extraordinary exception to the usual course of dealing, and requires a satisfactory explanation. This was a voluntary sale, made by the debtor, soon after the judgment against him, and made to a creditor, partly for cash, and partly to satisfy an old debt; and why was the sale made three months before possession was to be delivered, if it was not to defeat the intermediate execution of the judgment creditor? There is no assignable reason appearing for the arrangement, and the time of delivery might have been postponed for three years, as well as for three months. The instances in which a sale of chattels, unaccompanied with delivery, has been held valid, are all founded upon special reasons, which have no application to this case. In *Stone v. Grubham*, (2 *Bulst.* 225,) Lord Coke makes a

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bout facts. It
is the judgment
of law on facts
and intents.(a)

(a) 2 R. S.
137, s. 1.

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(a) Vide *Jackson v. Mather*, 7 *Cowen*, 501.

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distinction between an absolute and a conditional sale of chattels, and he says, that "if it was an absolute conveyance, and a continuance in possession afterwards, this shall be adjudged in law to be fraudulent; but when the conveyance is conditional; continuance in possession after this shall not, in the judgment of the law, be said to be fraudulent." This case related to a lease for years of land; and in *Edwards v. Hurben*, Mr. Justice *Buller* considers this as a well settled distinction, applicable generally, to the sale of personal chattels. We are not, however, to understand the meaning of these cases to be, that a conditional sale of chattels, unaccompanied with possession, is, *per se*, a good sale. It is only good in special cases, and all the instances referred to by *Buller*, in illustration of the distinction, are of that special character. A conditional, as well as an absolute sale, may equally be fraudulent, in point of law, as well as fraudulent in fact, unless the intent of the parties in creating the condition, be sound and legal. Neither the statute of 13, nor that of 27 *Eliz.* makes any distinction between conditional and absolute sales. The case of *Ryall v. Rolfe* (1 *Atk.* 165. 1 *Vez.* 359) arose under the bankrupt act of 25 *Jac.* I. which has a special provision, rendering liable to the commission, goods in possession of the bankrupt, by the consent of the true owner. The decisions under that act are, therefore, not strictly applicable to cases arising under the statute of *Elizabeth*; but the opinions given in that case were extremely elaborate, and led the judges to an examination of the whole law, respecting fraudulent sales. Mr. Justice *Burnet* observed, that there was no reason for a distinction, either at common law or under the statute of *Elizabeth*, between *conditional and absolute sales of goods, if made to defraud creditors, and that it was difficult, unless in very special cases, to assign a reason why an absolute or conditional vendee of goods, should leave them with the vendor, unless to procure a collusive credit.

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The cases in which a postponed delivery has been allowed, are all of them special, as I have already observed. In *Bucknal v. Roiston*, (*Prec. in Cha.* 285,) the goods were sold to *A.* the lender of money on bottomry, and the sale was in the nature of a mortgage or security for the loan, and he trusted *B.* the borrower to negotiate and sell the goods for *A.*'s advantage. The Lord Chancellor held the sale good, even against a judgment creditor, as the trust appeared upon the face of the bill of sale, and it was not to give a false credit, but for a particular purpose agreed upon at the time of sale. In *Cole v. Davies*, (1 *Ld. Raym.* 724,) it was ruled by *Holt*, Ch. J. that if goods of *A.* are seized upon *fi. fa.* and sold to *B.* bona fide, and for a valuable consideration, though *B.* permits *A.* to have the goods in his possession, upon condition that *A.* shall pay to *B.* the money, as he shall raise it by the sale of the goods, this will not make the execution fraudulent, and a subsequent act of bankruptcy by *A.* would not defeat the sale. This case carried the permission of retaining the possession to the greatest

length, perhaps, of any in the books. The last observation of Lord *Holt* was clearly inaccurate, as it is contrary to the provision in the statute of *James*, and contrary to what was said by the Lord Chancellor in the preceding case; but the case itself is confirmed by a late decision of the C. B. in *Kidd v. Rawlinson*. (2 *Bos. & Pull.* 59.) It was there decided that the purchaser at a sheriff's sale may leave the goods in the possession of the defendant, out of benevolence, and for a temporary and honest purpose. But Lord *Eldon* distinguished that case from one of a creditor buying goods to satisfy his own debt, and he places reliance on the circumstance that the parties did not stand in the relation of debtor and creditor. He said that the purchaser might be considered as the donee of the goods, lending money to the original defendant to purchase them through the medium of the sheriff, and taking a bill of sale, as a security for the money. In such cases it has been frequently said not to be absolutely fraudulent, or not so in point of law, to permit the donor to continue in possession. The only inquiry would be as to matter of *fact*, whether the transaction was really and intrinsically fair and honest. The case of *Bucknal v. Roiston* is analogous in principle, and more especially the case of *Maggott v. Mills*, (1 *Ld. Raym.* 286,) where it was held by the K. B. that if one man lends another money to buy furniture, and takes a bill of sale of the furniture, leaving it in the vendor's possession, and the contract be honest, it is then valid, though the court said, it would not be so, if the goods had been assigned to *any other creditor*, and the possession had been retained.

The same doctrine, accompanied with the same distinction, has been laid down in *Pennsylvania*, in the case of *Waters v. McClellan*. (4 *Dall.* 208.) *Shippen*, Ch. J. there observed, that "in the case of a voluntary sale of goods, the law, both in *Pennsylvania* and *England*, regards the continuance of the debtor's possession as a badge of fraud. In *England*, the law is the same where the sale is made by the sheriff; but in *Pennsylvania*, a different rule in that case has prevailed: and where a relation, or friend, after a fair purchase at public sale, leaves the goods in the occupation and use of the debtor, it never has been deemed a fraud upon creditors." The learned judge who pronounced that decision, could not have recollected the point ruled by Lord *Holt*, in *Cole v. Davies*, and he could not have known of the decision of Lord *Eldon*, for the two decisions were concurrent in point of time.

The cases of marriage settlements form another exception to the general rule. In those cases, the goods are conveyed to trustees for the use of the wife, and the law which countenances those settlements permits the wife, as *cestui que trust*, to have the possession as part of the trust, as essential to the object of the settlement and as being considered the same as possession by the trustees. The case of *Haselinton v. Gill*, (3 *Term Rep.* 620, *in notis*,) of *Cadogan v. Kennet*, (*Cowp.* 432,) and many others which might be referred to, all proceed upon this principle, and they, of course, have no bearing upon the pres

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ent question. Indeed, there is no case which sanctions such a sale as the one in the present instance; for here no reason whatever appears for withholding delivery of possession, and the sale must, therefore, be considered, in judgment of law, as fraudulent and void against the creditor. Fraud is a question of law, and especially, when there is no dispute about the facts. It is *the judgment of law on facts and intents*, as has been frequently observed by judges of the greatest eminence. The length of time for which the possession is to be withheld is not material, and does not affect the principle. Thus, in the late case of *Paget v. Perchard*, (1 *Esp. N. P.* 205,) the *sheriff was sued for seizing goods in execution, which had only the *day before* been sold by bill of sale to the plaintiff, as assumed creditor, but who had suffered the goods to remain with the defendant, and to be used as his own. Lord *Kenyon* ruled that this sale was fraudulent in law, as against a *bona fide* execution and nonsuited the plaintiff. A like decision was made by Lord *Ellenborough*, in the similar case of *Wordall v. Smith*. (1 *Campb. N. P.* 332.)

The general principle involved in this discussion, is extremely important to the commercial interests of the community, and to confidence and integrity in dealing. The law, in every period of its history, has spoken a uniform language, and has always looked with great jealousy upon a sale or appropriation of goods, without parting with the possession, because it forms so easy and so fruitful a source of deception. Lord *Kenyon* said that he lamented that it was ever decided that the possession and apparent ownership of personal property might be in one person, and the title in another, and he thought it would have been better for the public, if the possession of such property (except in the case of factors) were to carry the title. (7 *Term Rep.* 234.) The value of the principle, and its necessity, were perceived and felt as early as the age of *Glanville*; for he observed, when speaking of pledges, (*Lib.* 10. c. 8,) that “when a thing is agreed to be placed in pledge, by a debtor to a creditor, *and delivery does not follow*, it becomes a question what shall be done for the creditor in that case, *since the same thing may be pledged to other creditors both before and after*. And it is to be observed, that the court will not regard such private arrangements, nor intermeddle therewith, or *sustain a suit thereon*.” This was acknowledging the mischief, and admitting the remedy, under the same enlightened view of public policy and private interest, which some of the decisions of Lord *Mansfield* announce, at the period of the full growth and maturity of the commercial system. There is also a case in the *Book of Assises*, f. 101. pl. 72. 22 *Edw.* III. which is much to the present purpose. An action of trespass was brought for wrongfully taking some cattle, and the jury found that the defendant had received from the bailiff the beasts, on an execution which had issued for him against one *B.* and that the beasts belonged to *B.* at the time of the judgment, and that he afterwards, by deed, gave them to the plaintiff to delay me

execution: and the jury being required by the court to say *who took the profits of the same *beasts in the mean time*, they answered, that the *donor did*. Then *Thorpe, J.* declared: "I conceive the gift to be of no value, and I hold, that he to whom such gift was made, was only keeper of the beasts, to the use of the other, because, there was fraud, &c. *for otherwise, a man could never have execution of chattels*; wherefore, take nothing by your bill."

We may, therefore, safely conclude, that a voluntary sale of chattels, with an agreement, either in or out of the deed, that the vendor may keep possession, is, except in special cases, and for special reasons, to be shown to, and approved of, by the court, fraudulent and void, as against creditors. This is clearly not one of those cases, and the defendant is, therefore, entitled to judgment.

Judgment for the defendant.

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CARPENTER.

HITCHCOCK, AND HIS WIFE, WHO WAS THE WIFE OF FERRIS, *against* CARPENTER.

THIS was an action of *dower*. *David Ferris*, deceased, the former husband of *Rachel*, the wife of *Hitchcock*, was seised, in his life-time, of lot No. twelve in *Queensberry*, in *Washington* county, being the land of which the demandant claimed dower. The defendant pleaded, 1. *Ne unque seise que dower, &c.* 2. *Ne unque accouple, &c.* 3. That *David Ferris* is in life, &c. 4. A conveyance by the demandant, of the premises in question in fee to *Elijah Bartow*, his heirs, &c.

The cause was tried before Mr. Justice *Yates*, at the *Washington* circuit, the 17th *June*, 1812.

It was proved that *David Ferris* lived on the land about twenty years ago; that he afterwards went to the western country, and it was reported that he was drowned in the *Ohio* river; that *Ferris* and the demandant lived together, as man and wife, and that she has since married the plaintiff. It also appeared that the defendant was the tenant in possession of the premises, and claimed to hold under the *heirs* of *David Ferris*. The yearly value of the premises was proved.

The defendant gave in evidence a release of the premises in question, before the commencement of the suit, duly executed by the demandant to *Samuel Odell*. The plaintiff's counsel objected *to the evidence, on the ground that it ought to have been pleaded, or notice of it given with the general issue. The judge overruled the evidence, and the jury, under his direction, found a verdict for the plaintiffs.

The defendant moved for a new trial; 1. Because there was not sufficient evidence of the seisin and death of *Ferris*; 2. Because the release offered in evidence by the defendant was improperly rejected.

Skinner, for the defendant.

Z. R. Shepherd, contra, cited the case of *Hitchcock v. Harrington*, (6 *Johns. Rep.* 290.)

In an action of *dower*, the defendant pleaded, 1. *Ne unque seise, &c.* 2. *Ne unque accouple, &c.* 3. That the husband of the demandant was in life, &c. It was held that the defendant claiming to hold under the *heirs* of the husband of the demandant was estopped from denying his seisin and death; (a) and that the defendant could not, at the trial, give in evidence, under the pleas, a release of the premises to *A.* executed by the demandant; but that such release must be pleaded.

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(a) Acc. *Collins v. Torrey*, 7 *Johns. Rep.* 278.

NEW-YORK,
October, 1812.

MIDBERRY
v.
COLLINS.

Per Curiam. As the defendant claims under the heirs of *Ferris*, he is estopped from denying the seisin and death of *Ferris*, the former husband of the demandant. He has affirmed that seisin by taking under the heirs. This was so considered by this court, in the case of *Hitchcock v. Harrington*. (6 *Johns. Rep.* 290.)

The release offered in evidence by the defendant was properly excluded. It ought to have been pleaded. It could not be given in evidence under any of the pleas on which issue was joined. It had no relation to either. Motion denied.

MIDBERRY against COLLINS AND MEAD, OVERSEERS OF THE POOR OF NORWICH.

Where on the return to an *alternative mandamus*, commanding the judges of a court of common pleas to sign and seal a bill of exceptions, or show

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cause, &c. it appeared, that the bill of exceptions was not tendered to the judges at the trial, but was presented to them individually, at different times, after the court had adjourned for the term. this court refused to grant a *peremptory mandamus*.

The facts on which a bill of exceptions is taken must be reduced to writing at the time, and presented distinctly to the court, during the trial, or, at least, during the continuance of the term. (a)

AN alternative *mandamus* had been issued, pursuant to a rule of this court, directed to the judges and assistant justices of the Court of Common Pleas of *Chenango* county, commanding them to sign and seal a *bill of exceptions*, which had been tendered by the defendant in the above cause, or show cause, &c. One of the judges signed the bill of exceptions, and two of them made a separate return, under their hands and seals.

*The return stated that the cause came on to be tried, at the last *October* term, before the *Chenango* Common Pleas; that several of the material facts stated in the bill of exceptions were incorrect and untrue; that the bill was not tendered at the trial, but presented to the judges individually, at different times, after the court had adjourned for the term, and the statements in the bill were found to be untrue; that the court did not decide that two of the jurors should be excluded as witnesses, on account of their interest, but referred the question of their competency to triors; that the contract between the overseers of the poor of the town was offered in evidence, and read only to show the division of the poor money, and not read or relied on as evidence of the contract on which the suit was brought; that the court did not refuse, as stated in the bill of exceptions, to permit *Calkins* to swear that the contract was conditional, but he and two other witnesses testified that there was no condition; that the court did not refuse to charge the jury on the law and the fact, but did so charge them; that from the length of time elapsed since the trial, the judges cannot recollect all the material facts in the case with sufficient certainty.

On reading this return, a motion was made for a *peremptory mandamus*.

Per Curiam. The fact stated in the return of the two judges, that the bill of exceptions was not tendered at the trial, but presented to the judges individually, after the term had end-

(a) The bill of exceptions must be presented to the judges of the common pleas and signed and sealed by them while acting together as a court. It is irregular if presented to, and signed by them separately out of court. *Clark v. Dutcher*, 19 *Johns. Rep.* 246. *Vide Lamson v. Baker*, 10 *Johns. Rep.* 312. *Delavan v. Boardman*, 5 *Wendell*, 132.

ed, is sufficient cause for denying the present motion. The facts attending a trial are extremely liable to be mistaken or forgotten, if they are not reduced to writing at the time, and presented distinctly to the court during the continuance of the term. As this bill was not tendered until the subsequent vacation, we will not now award process to compel the judges to sign it. The reasons upon which the court refused to grant a like motion, in the case of *Sikes v. Ransom*, (6 Johns. Rep. 279,) apply to this case.

Motion denied.

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October, 1812.

MATTER OF
BLISS.

*IN THE MATTER OF WILLIAM M. BLISS, GENT. &C.

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A MOTION was made, at the last term, for the allowance of a writ of privilege, in behalf of *William M. Bliss*, an attorney and counsellor of this court. The affidavit, on which the motion was made, stated that *Bliss* was a practising attorney and counsellor of the court, and had been ordered by a captain of a company of militia, in the town of *Troy*, to perform military duty as one of the company, and had been sentenced to pay a fine for his non-attendance at the company parade, pursuant to the order and notice for that purpose; and that he had lately been drafted into a company of militia, and ordered by the commandant of the company, to hold himself in readiness to march, at a moment's warning, as one of the militia, detached, pursuant to a late law of the *United States*, for the defence of the state of *New-York*.

Attorneys and counsellors at law, are not privileged from serving in the militia. Tho' the common law privileges of the officers of courts of justice cannot be taken away by general words, yet they may by the express words or manifest intent of a statute.

The Court intimated an opinion against the motion; but said the question intended to be raised was so important, that it ought to be argued, and that notice should be given to the *Attorney-General* to attend at the next term, to argue the motion in behalf of the people.

The motion was again made at this term.

P. W. Radcliff, in support of the motion, cited 4 Burr. 2109. 2114. Cro. Car. 11. 2 Johns. Cas. 103. Off. Brev. 164. 174. Coke's Entries, 474. Rich. K. B. Pr. 340. Str. 1143. 1 Lev. 265. 1 W. Bl. 636. 1123—1127. The several Militia Laws of the United States, and of this State. 2 Inst. 395. Com. Dig. Parliament, R. 23, 24.

T. A. Emmet, (Attorney-General,) contra.

Per Curiam. It was a principle of the common law, that the privileges of the officers of the courts of justice were not to be taken away by the general comprehensive words of a statute. This doctrine is not to be questioned; and as the privilege is granted, not for the sake of the individual, but of the suitors, and of the administration of justice, it is the duty of the courts to give this privilege their constant protection. It is, however, as little to be disputed, that the legislature may, in its discretion, abridge or *take away this privilege; and whenever the legislative will is to be ascertained with perfect certainty, either from the express words, or the manifest intent, of the statute, the courts are bound to yield obedience to that

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MATTER OF
BLISS.

will. To contend that the privilege of an attorney cannot be taken away, without express words mentioning *attorneys*, when the sense of the legislature shall otherwise appear, with equal conviction and certainty, does not seem to be consistent with a due obedience to law. In *Gerard's Case*, (2 Bl. Rep. 1123,) Mr. Justice *Blackstone* admits that a privilege, inherent in the officers of a court by common law, may be taken away by the express words, *or manifest intent, of the statute*, or by a general negative that such and such persons shall be exempted, *and no other*. In examining the militia laws, we think it perfectly clear, that the legislature intended that attorneys should not be exempted. In the first place, the constitution of this state, (article 40,) when speaking of the militia, declares, that "it is the duty of every man who enjoys the protection of society, to be prepared and willing to defend it." The importance of the militia to the public defence has been more uniformly acknowledged, and more deeply inculcated, in this country than in *England*, and the value and necessity of the service would be more likely to be enhanced, when brought into competition with the common law privilege of the officers of the courts. The act of congress of *May*, 1792, declares that "each and every free able-bodied white male citizen of the respective states, except," &c. shall be enrolled. And it then excepts the vice-president of the *United States*, the officers judicial and executive of the government of the *United States*, the members of congress, &c. and "all persons who now are, or may hereafter be, exempted by the laws of the respective states." The act of the legislature of the 32d session, c. 165, (a) declares, that in addition to persons exempted by the act of congress, the following persons shall be exempted, viz. the lieutenant-governor, the members of both houses of the legislature, and *their respective officers*, while in the execution of the duties of their respective offices, the chancellor, *the chief justice and other justices of the supreme court*, judge of the court of probate, and *all other judicial officers of this state*, all ministers of the gospel," &c.

(a) 1 R. S.
225, s. 2.

The act of 1801, as well as the act of 1786, extended the exemption still further, and included, by name, *the attorney-general, and registers and clerks of courts, sheriffs, coroners and constables, &c.* These special exceptions do, by irresistible inference, imply that *the ministerial officers of the court are not excepted, and it would be against all the settled and rational rules of interpretation, to hold that attorneys were still entitled to exemption. A statute is to be so construed, if possible, as to give sense and meaning to every part, and the maxim was never more applicable, that *expressio unius personæ est exclusio alterius*. The sages of the law (says *Plowden*, 205, b.) have been guided by the intention of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion. These special exemptions, in the act, of the officers of the courts, are idle and superfluous,

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and involve an absurdity, if the attorneys of the court are nevertheless exempted, without any such exception. We can cheerfully acquiesce in the general doctrine, that the privilege of the attorney is valuable, and is not to be taken away by general words, or when the statute is susceptible of any other reasonable construction. But when the intent is so manifest as to leave no doubt of it, and when all the rules which the wisdom of the common law has provided for the interpretation of statutes declare that intent, and the statute would otherwise be made to speak without sense or meaning, the courts are bound to follow that intent, as much as if it had been conveyed in express words.

Motion denied.

NEW-YORK,
October, 1812.

FOWLER
v.
LANSING.

FOWLER against LANSING.

IN error, on *certiorari*, from a justice's court. *Lansing* brought an action against *Fowler* before the justice, to recover the penalty of five dollars, for obstructing a highway or road, under the 19th section of the act, to regulate highways, (*sess.* 24. c. 186,) (a) which declares, that, "if any person shall hereafter obstruct any highway or road, or shall fill up or place any obstruction in any ditch constructed for draining water from any road, such person shall forfeit five dollars, for every offence, to be recovered," &c. The road was not a public highway, but a private road, laid out by the commissioners, under the 16th section of the act.

The penalty given by the 16th section of the act, regulating high-

(a) 1 R. S. 521, sec. 102.

ways, (*sess.* 24, c. 186,) for obstructing highways or roads, relates only to obstructions of highways or public roads, and not of a private road.

The justice gave judgment for the penalty.

R. M. Livingston, for the plaintiff in error.

W. Mackmaness, contra.

**Per Curiam*. This was an action to recover the penalty, under the 19th section of the act to regulate highways, for obstructing a private road, and the justice gave judgment for the penalty. The question is, whether the penalty given by that section is recoverable for such obstruction. We think, the sound and just construction of that section to be, that it relates only to highways or public roads. It ordains, "that if any person, within any of the said towns shall hereafter obstruct any highway or road, &c. such person, so offending, shall forfeit for every such offence, the sum of five dollars, to be recovered," &c. In various parts of the act, the term *road* is used synonymously with *highway*, and when it speaks of a road for individuals only, it is spoken of as a private road. The penalty is given to the commissioners of the town in which the offence was committed, for the improvement of the public roads and bridges, in the town, and this fortifies the construction to this part of the act; for an obstruction of a private road, is a mere private injury, in which the public have no concern; and it would be quite absurd to suppose that the legislature meant to inflict a penalty, and to appropriate it to the public, for an injury solely of a private nature. On this ground, we reverse the judgment.

Judgment reversed.

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October, 1812.

PORTER
v.
ANDREWS.

A seaman
signed articles
for a voyage
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from New-York to North-Carolina, and thence to a port in Europe. The vessel went from New-York to North-Carolina in ballast, and there took in a cargo, and sailed for Europe; but was compelled, in consequence of springing a leak, to put in to New-York for repairs.

The seamen made no application for repairs, under the law of the United States; but the owners voluntarily caused repairs to be made; and the vessel after the repairs, was, in the opinion of the master carpenter, and three shipbuilders, perfectly seaworthy; though seven journeymen carpenters were of opinion that she was not seaworthy; and on that ground the crew refused to proceed on the voyage. No freight was earned, the cargo having been landed, only for the purpose of repairs, and was reladen after they were completed. An action was bro't by one of the

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seamen, who refused to proceed, to recov-

PORTER against ANDREWS.

IN error, from the Justice's Court of the city of *New-York* *Andrews* brought an action in the court below, against *Porter*, master of the ship *Eliza Ann*, for his services as a seaman, on a voyage from *New-York* to *North Carolina*, and from thence to **New-York*. It was proved that the plaintiff below signed articles in the usual form, for a voyage on board of that ship, "from *New-York* to *North Carolina*, and from thence to one or more ports in *Europe*, and back to her port of discharge in the *United States*." The plaintiff shipped the 18th *August*, 1811, at seventeen dollars per month. The ship proceeded on her voyage, in ballast, and discharged her ballast in *Wallace's Channel*, in *North Carolina*, and there took in a cargo and cleared out for *Gibraltar*. After being at sea and during the prosecution of her voyage, she was found to make so much water, that it was thought necessary to put into *New-York* to re-fit. On her arrival, the owner voluntarily proceeded to repair the ship, without any application of the seamen, for that purpose, under the act of Congress. On examination it appeared that the timbers of the ship were sound, and that the leak was occasioned by the planks in her bottom being eaten by worms, while she was in *North Carolina*. Seven journeymen ship-carpenters, who were employed in repairing her, testified, that, in their opinion, she was not so repaired as to be seaworthy, though she might have been made so; that the larboard side was sufficiently repaired, and had the starboard side been repaired in the same manner, she would have been seaworthy. The owners refused to make any further repairs, and loaded her for sea. The plaintiff below, and the rest of the crew refused to proceed to sea in the ship, on the ground that she was not seaworthy. The master ship-carpenter, under whose direction the repairs were made, and three ship-builders, who were called to survey the ship, were of opinion that the ship was perfectly seaworthy.

It appeared that no *freight* had been earned by the ship, she having landed her cargo in order to be repaired; and the cargo was reladen and carried to her port of destination.

The court below being of opinion that the vessel was not seaworthy, and that the plaintiff was not bound to proceed to sea in her, gave judgment in his favor, for eighty-seven dollars, being the amount due to him.

The case was submitted to the court without argument.

Per Curiam. There was contradictory evidence as to the seaworthiness of the ship, after the owners had repaired her, and the court below concluded that she was not seaworthy, and allowed the seamen their ratable wages. It does not appear, but that the ship was seaworthy when she sailed from *New-York*; and as she lay several months in *North Carolina*, and no leakage appeared *on the voyage there, the presumption is that the injury by worms arose while she lay in the river at *North Carolina*. The question, then is, whether wages are re-

coverable in this case, when no *freight* was earned; and when, in the opinion of the master carpenter, employed to repair the ship, she was sufficiently repaired for the voyage. The act of Congress (*Laws of U. S.* vol. 1. 135) had provided a competent tribunal to settle such questions, by enabling the mate and a majority of the crew to cause application to be made to the district judge, who would have directed an examination to be had, and have eventually determined upon the duty of the seamen. There is no case to be found, which allows wages when no freight is earned, and when the loss of the voyage is not to be imputed to the default of the master or owner. In this case, the crew neglected to apply, under the act of Congress, for the requisite repairs, but submitted to have them made under the direction of the owners, who conformed to the judgment of the master ship-carpenter; and that must be deemed sufficient (even admitting a want of seaworthiness to justify a demand for wages) to excuse the owner from the payment of wages, if the crew, afterwards, refused to abide by the judgment of the master ship-carpenter, and to perform the voyage. They cannot be permitted, in a case free from any suspicion of fraud, to set up the opinion of journeymen workmen, not only to excuse their breach of contract, but to justify their demand for wages. Such a practice, if tolerated, would be extremely prejudicial to the merchants' service.

Judgment reversed.

NEW-YORK,
October, 1812.

PHINNEY
v.
EARLE.

er his wages, to the time.

It was held, that he was not entitled to recover, there being no freight earned, nor any loss of voyage imputable to the master or owners. (a)

(a) *Vale Murray v. Kellogg*, supra, 227, note (a). *Bartlett v. Wyman*, 14 Johns. Rep. 260.

PHINNEY against EARLE.

IN error, on *certiorari*, from a justice's court. *Earle* sued *Phinney*, before the justice, on a promissory note, dated 7th December, 1810, for thirteen dollars and sixty cents, payable on demand to *J. Allen* or bearer, on which was endorsed one dollar and four cents.

*On the return of the summons, the defendant and his attorney appeared, and the constable who served the summons, said he would appear and answer for the plaintiff, if the defendant and his attorney would take no advantage of it, to which they agreed, and the constable then presented and declared upon the note; and the defendant pleaded *non assumpsit*. The cause was adjourned for trial. The defendant admitted the note in question, and proved, that he had before sued one *Luther Johnson*, before another justice, and recovered against him, and that *Johnson* was then the owner and possessor of the same note, and did not set it off, pursuant to the statute. The defendant proved, that in the suit against *Johnson*, the note was offered as a set-off by him, and the justice rejected it, on the ground, that previous to the transfer of the note by *Earle* to *Johnson*, and before the same was due, *Earle* had agreed to receive payment of it in ashes.

The plaintiff also proved that, before and since the commencement of the suit, the defendant had confessed that he

(a) Acc. *Kittle v. Baker*, infra, 354.

In an action before a justice, the constable who served the summons, answered for the plaintiff,

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and presented to the justice, the note on which the suit was brought, and stated the plaintiff's demand. This was held not to be appearing and advocating the cause, within the meaning of the act. (Sess. 31, c. 204.) (a)

The defendant pleaded that while one *I.* was the owner and possessor of this note, he sued him before a justice, and *I.* neglected to set off the

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KITTLE
v.
BAKER.

note, pursuant to the act. It appeared that the note was offered as a set-off but was objected to by the defendant, and rejected by the justice, because, before it became due, and previous to its transfer, the plaintiff had agreed to receive payment in ashes. It was held, that the defendant, after having objected to the admissibility of

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the set-off, could not take advantage of a want of it; and that the set-off made by I. was,

justly owed the amount of the note, and requested the plaintiff to take payment in blacksmiths' work.

The justice gave judgment for the plaintiff, for thirteen dollars and ninety cents.

Kellogg, for the plaintiff in error.

Richardson, contra.

Per Curiam. There is no error in the proceedings or judgment. The constable who served the process, did not "*appear and advocate*" for the plaintiff, within the meaning of the act. (*Sess. 31. c. 204.*) (a.) The statute refers to an appearance, at the trial of the cause. He merely appeared for him to present the note to the justice; and did not appear at the trial. The former judgment against *Johnson*, while holder of the note in question, was no bar to the plaintiff's suit, because, under the special agreement to take payment of the note in ashes, the note was not negotiable after it was due, without being subject to that agreement; and it was properly rejected, when offered as a set-off by *Johnson*. It was returned, therefore, to the plaintiff below, and the defendant, after such return, had confessed that he owed it to the plaintiff. Having objected to its admissibility, as a set-off by *Johnson*, he cannot now take advantage of that act, (even if erroneous,) *to defeat a recovery altogether on the note. Nor does it appear, that the judgment was for more than the face of the note, with interest, deducting the endorsements. Judgment affirmed.

under the circumstances, properly rejected. (b)

(a) 2 R. S. 233, sec. 44.

(b) Vide *Bull v. Hopkins*, 7 Johns. Rep. 22, and note.

KITTLE against BAKER AND BROWN.

Where a constable who served a summons, answered for the plaintiff, and exhibited his demand to the justice, and no objection was made by the defendant, it was held, that it could not be alleged for error. (a)

The justice may, on the return of a summons, at the request of the plaintiff, adjourn the cause for six days, without requiring an oath of the absence of material witnesses. (b)

IN error, on *certiorari*, from a justice's court. *Kittle* sued *Baker and Brown* before the justice. On the return of the summons, the parties being called, the constable who served the summons answered for the plaintiff, and the defendants appeared by their attorney. The constable then exhibited to the justice the plaintiff's demand, to which the defendants pleaded *non assumpsit*. On motion in behalf of the plaintiff, the cause was adjourned, for want of his witnesses, from the 15th to the 21st *February*. The adjournment was objected to by the defendants, but was granted, without requiring any oath of the absence, or materiality of the witnesses. No objection was made to the constable's appearing for the plaintiff.

At the adjourned day, the defendants did not appear, and the plaintiff's demand being proved, the justice gave judgment for the plaintiff, for three dollars and twelve cents.

Per Curiam. The appearance of the constable who served the summons, being confined to the exhibition of the plaintiff's demand, was not objectionable. The justice was authorized

(a) See *Phinney v. Earle*, *supra*, 352. *Tallman v. Woodworth*, 2 Johns. Rep. 385.

(b) But he cannot adjourn for more than six days. *Danham v. Heyden*, 7 Johns. Rep. 361 and the cases there cited in note (a.)

to adjourn the hearing of the cause, from the day of the return of the summons, to a reasonable time, "not exceeding six days thereafter;" and as he did not exceed that time, his proceeding was not erroneous, nor does it appear to have been unreasonable.

Judgment affirmed.

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October, 1812.

STRATTON
v.
HERRICK.

***LEONARD against GIDDINGS.**

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IN error, on *certiorari*, from a justice's court. *Leonard* sued *Giddings* before the justice, on a written instrument, recommending one *Potter*, and promising if *Leonard* would let *P.* have a barrel of pork, he, *Giddings*, would be responsible with *P.* for the same. The cause was tried by a jury. The plaintiff proved the promise and the delivery of the pork to *P.* to the value of thirteen dollars and seventy-five cents.

The defendant then proved that the plaintiff had sued *Potter* for the pork, and recovered judgment against him, on which an execution had issued, which was returned *nulla bona*. But though no levy was made, the constable took a receipt from *Jesse* and *Joseph Potter* for a horse, which they acknowledged to be held by them to be delivered to the constable at a certain day and place, to answer on the execution. The horse was not delivered, nor was any thing collected on the execution, which was not actually returned until after the expiration of thirty days from the time it issued. The constable sued *Jesse* and *Joseph Potter* on their receipt, and recovered judgment against them, on which execution was issued, which was returned *nulla bona*. These facts appeared from the entries in the minutes, or docket book, of the justice. The evidence on the part of the defendant was objected to by the plaintiff, but the objection was overruled by the justice, and the jury found a verdict for the defendant, to which no objection was made by either of the parties who were present at the time.

Kellogg, for the plaintiff in error.

Richardson, contra.

Per Curiam. The defendant below was liable to the plaintiff upon his special promise, as it was in writing, and as it was supported by the consideration expressed upon the face of the agreement. Being liable, the matter set up as a defence was no discharge, for it was no satisfaction or payment of the debt. The plaintiff having pursued *Potter* to judgment and execution, without effect, was not bound to prosecute the constable, merely because he might have rendered himself liable for the debt.

Judgment reversed.

A. sued B. on a written engagement, promising if C. did not pay A. for the goods delivered to him, on the recommendation of B., B. would be responsible for the amount. A. sued C. for the goods and recovered judgment, on which execution was issued, and returned nulla bona by the constable; but under circumstances which were supposed to make the officer liable for the debt. A. afterwards sued B., who set up the proceedings against C. &c. in his defences. It was held, that C. was liable on his promise to A. and that the matters set up in defence were no discharge; that A. having prosecuted C. to judgment and execution, without effect, was not bound to go further and prosecute the officer, for his supposed liability.

***STRATTON against HERRICK.**

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IN error, on *certiorari*, from a justice's court. *Herrick* brought an action against *Stratton*, before the justice, for ob-

Where a turnpike act (secs. 28, c. 22,) ex-

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STRATTON
v.
HERRICK.

empted persons going to and from a blacksmith's shop, from the payment of toll, it was held that to be entitled to this exemption, the person must go to the blacksmith's shop for the express purpose of having work done in the shop. Going there with articles to pay for work done at a former time, by the blacksmith, does not entitle him to the exemption. (b)

(a) 1 R. S.
584 585, sec.
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(b) Vide
Stratton v.
Hubbel, *infra*,
357. Hearsey
v. Pouyn, 7
Johns. Rep. 179.
Hearsey v.
Boyd, 7 Johns.
Rep. 183. Chest-
ney v. Coon, 8
Johns. Rep. 150.
Bates v. Su-
therland, 15
Johns. Rep. 510.

structing the road leading from the village of *Cocksackie*, on the 1st of *June*, 1812, in such a manner as to prevent the plaintiff from passing with his wagon and horses, whereby he was hindered from pursuing his lawful business, &c.

Samuel Rockwell, a witness for the plaintiff, testified, that he was a blacksmith, and did work for the plaintiff on the 1st of *June*; and that on that day the plaintiff brought him a load of boards to pay for smith work done for him a year before. On the 1st of *June*, the plaintiff came with his wagon to the turnpike gate, and the defendant demanded *toll*, and the plaintiff claimed to pass free, as he had been to the blacksmith's; but the defendant shut the gate, and refused to let the plaintiff pass, unless he paid the toll. The plaintiff, after waiting about an hour and a half, turned back and went by another road.

It appeared that the defendant asked the plaintiff what he had done with the load of boards, and the plaintiff refused to inform him. The act of incorporation of the turnpike company was read. It was proved that the plaintiff resided about seven miles from the turnpike gate, and one blacksmith lived within two miles, and another within four miles, of the plaintiff's house; but the blacksmith who testified that he did work for the plaintiff, lived east beyond the turnpike gate, in the village of *Cocksackie*. The jury found a verdict for the plaintiff, for five dollars, on which the justice gave judgment.

Kirtland, for the plaintiff in error.

Powers, contra.

Per Curiam. The turnpike act, (*sess.* 28. c. 22,) (a) under which the toll was demanded, exempts from the payment of toll any person passing "to and from a blacksmith's shop to which he usually resorts." Assuming that the blacksmith's shop of *Samuel Rockwell*, in the village of *Cocksackie*, was the one to which the plaintiff below usually resorted, yet it must appear that the object of his going to the shop was for work to be done at the shop. Carrying a load *of boards, or wheat, or going with a drove of cattle to the blacksmith, for the purpose of paying a debt, would not entitle the party to exemption from toll, any more than if he was going merely to pay a family or friendly visit to the blacksmith. Any other construction of the act would be unreasonable and lead to fraud. Every farmer, carrying a load of wheat to market, might always, upon the construction given to the act by the jury, exempt himself from toll, by calling at the blacksmith's shop, in his way, and getting a horse-shoe reset. If the principal object of the travelling be to have blacksmith work done, the person is entitled to pass toll free, but not otherwise. Here the object appears to have been to pay a debt. That must have been the principal end, and the verdict was, consequently, against law.

Judgment reversed.

STRATTON *against* HUBBEL.NEW-YORK,
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v.
MOONEY.

IN error, on *certiorari*, from a justice's court. *Hubbel* sued *Stratton*, before the justice, for obstructing the highway leading from the village of *Cocksackie* and preventing the plaintiff from proceeding on the road, about his lawful business, &c. It was proved that the plaintiff came to the turnpike gate, with his wagon and horses, and demanded to pass free, because he had been to his usual blacksmith's. The defendant, who was the toll-gatherer, refused to let him pass until he paid the toll. The plaintiff confessed that he had been down to *Cocksackie* landing, with a load of boards, and had paid toll on going down. *Rockwell*, the blacksmith, testified, that he had been the plaintiff's usual blacksmith for a number of years, and had mended a pot for the plaintiff about the time the plaintiff claimed to pass toll free on his return, but the witness could not remember the exact day. The jury found a verdict for the plaintiff, for five dollars, on which the justice gave judgment.

Kirtland, for the plaintiff in error.

Powers, contra.

Per Curiam. There was no just pretence for an exemption from toll. The principal business of *Hubbel* was to carry a load of boards to market; and if the pot had been mended by the blacksmith, on that day, it was not, and could not have been, the principal object of the journey. It was merely an incidental business, if not a mere pretext to claim the exemption. He ought to be considered as returning from market, and not as returning from the blacksmith's shop; because that shop was not the termination any more than the object of his travelling on that day from home. The claim of exemption was unjust, and a fraudulent abuse of the act.

Judgment reversed.

Where a turnpike act exempted persons going to their usual blacksmith's shop from the payment of toll, it was held that a person who had carried a load of goods to market, and on his return, stopped at his blacksmith's to get work done, was not entitled to pass toll free, on his return home. The going to the blacksmith's must be the principal, not the incidental business, to bring it within the exemption. See *Stratton v. Herrick*, ante, 356. 1 R. S. 584.

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tal business, to bring it within the exemption. See *Stratton v. Herrick*, ante, 356. 1 R. S. 584.

TRYON *against* MOONEY.

IN error, on *certiorari*, from a justice's court. *Mooney* sued *Tryon*, before the justice, on a due bill, given for wheat, for twenty-three dollars. The defendant below offered to prove, by way of set-off, that he had pastured horses for the plaintiff to the value of fifteen dollars; that after the defendant had, by deed, leased his farm to the plaintiff, it was agreed between them, that the plaintiff was not to have the pasture of the farm, except for the use of his team, when at work on the farm, and that if the plaintiff used the pasture, he was to allow the defendant for it. This evidence was objected to by the plaintiff below, and rejected by the justice, who gave judgment for the plaintiff, for the twenty-three dollars.

Per Curiam. The parol agreement set up, by way of set-off, was without consideration, and, consequently, null and void. The interest in the farm, and the possession of it, and

A. leased a farm to *B.* and in an action by *B.* against *A.* he pleaded by way of set-off, a demand for pasturage founded on a parol agreement, made at the time of the lease, that *B.* was not to use the pasture land, without allowing *A.* for it. It was held that this parol agreement was without consideration, and void.

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which included the right of pasture, was vested in the plaintiff by lease, under seal. An agreement that a party will not use his own pasture, in his own possession, without paying for it, requires a consideration as well as a promise in writing, to give it validity; and there does not appear to have been either. The evidence was, therefore, properly overruled.

Judgment affirmed.

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*SPICER against SLADE.

To bring a person in default, for not obeying the order of the commissioners of highways, and render him liable for the penalties under the act to regulate highways, (sess. 24, c. 186,) for an encroachment on the highway, it is necessary that the commissioners should meet, deliberate and decide on the alleged encroachment, and give notice to the party to remove his fence in sixty days, which notice ought to state specially the breadth of the road originally intended, the extent of the encroachment, and the place or places where, so that the party may know how to obey the order for removing his fence. [Vide 1 R. S. 521, 522, sec. 102—104.] (a)

IN error, on *certiorari*, from a justice's court. *Slade* brought an action of debt against *Spicer*, in the court below, for the penalty of twenty-five dollars. The plaintiff declared that the defendant was the occupant of a certain piece of land in *Pittstown*, through, or by which a certain highway runs, and that the commissioners of highways of the town, under the twentieth section of the act relative to highways, ordered the defendant to remove his fences, being on the same road, for an encroachment, so that the highway might be of the usual breadth; but that the defendant continued the same fence for sixty days after notice of the order of the commissioners to remove the same, and hath continued the same fence for fifty days since the expiration of the said sixty days, and still continues the same, whereby an action had accrued to the plaintiff to demand and have of the defendant fifty cents for every day the fence had continued, after the said sixty days, &c. The defendant pleaded *nil debet*. At the trial, before a jury, in *February*, 1811, it was proved, that on the 1st *July*, 1810, application was made to the commissioners of highways, in *Pittstown*, and a jury was summoned to ascertain whether there was any encroachment by the plaintiff, on the highway, between the house of the defendant and the *Hosick* line. The jury met on the 11th *July*, and found by their verdict, that there was an encroachment on the highway, by *Slade* and *Spicer*, which report or verdict the commissioners refused to accept, on the ground that the complaint to the commissioners was against *Slade* (the plaintiff) only. It was also proved, that the commissioners, on the 11th *July*, 1810, ordered *Spicer*, the defendant, to remove his fence, so as not to encroach on the highway; and that the encroachment by the defendant continued a long time afterwards, and down to the time of the trial, in *February*, 1811. One of the commissioners, a witness for the plaintiff, testified, that he attended with the jury, on the 11th *July*, and refused to receive their verdict, and that the defendant then confessed that he had encroached on the highway; and that he, as one of the commissioners, ordered the defendant to remove his fence, if he had encroached; and it appeared that the commissioners did on that day give the defendant notice of the encroachment, and order him to remove his fence. The jury found *a verdict for the plaintiff, for twenty-five dollars, on which the justice gave judgment.

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(a) Vide *Bronson v. Mann*, 13 *Johns. Rep.* 460.

R. M. Livingston, for the plaintiff in error.

Buel, contra.

Per Curiam. Several objections have been taken to the recovery below, which need not be noticed, since we perceive one which goes to the merits of the case. Before the party can be in default, and liable to the cumulative penalties given by the twentieth section of the *act to regulate highways*, (*sess.* 24. c. 186,) the commissioners of highways of the town must have given him a previous notice or order of sixty days, to remove his fence. We are of opinion that the requisite order was not made in this case. The words of the statute are, "Where a highway has been laid out, and the same has been encroached upon by any present or former occupant of the land, through or by which such highway runs, the commissioners of the town shall, if in their opinion it be deemed necessary, order the fences to be removed, so that such highway may be of the breadth originally intended." If the removal be not made in sixty days after such notice given, the penalties attach. To perform this duty, the commissioners should all meet and deliberate together on the subject of the alleged encroachment; and then, if they, or a majority of them, should deem it necessary, they are to order the fence to be removed, so that such highway may be of the breadth originally intended. In this case, there does not appear to have been any such meeting, deliberation and decision, any further than what might be inferred from the fact that a witness heard one of the commissioners tell *Spicer* to remove his fence, that is, if he had encroached on the road or highway; and another witness heard the commissioners order him to remove his fence, so as not to encroach upon the highway; and a third heard them give him notice of the encroachment, and order him to remove his fence. This order or notice was not sufficiently precise and particular to satisfy the law, and bring the party into default. The breadth of the road originally intended, and the extent of the encroachment by the party upon that breadth, and the place or places where, ought to have been specially stated, so that he might be able to obey the order, and know when he had performed his duty. The whole proceeding in this *case was extremely loose and uncertain; and the party ought not to be exposed to penalties, when the order or notice is stated so vaguely that he cannot ascertain from it, with any reasonable certainty, the situation or extent of his encroachment.

Judgment reversed.

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v
COOK.

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BROWN AND HOTCHKISS *against* COOK.

IN error, on *certiorari*, from a justice's court. *Cook* brought an action against *Brown* and *Hotchkiss*, before the justice, and declared on a receipt given by the defendants to him, for a pair of horses, the property of *Jedediah Chapman*, which the plaintiff, as constable, had taken on an execution; and

A constable having taken goods on an execution against *B.* delivered them to *C.*, who gave a

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receipt for them, promising to deliver them to the constable on demand. The constable suffered the execution to expire, without making any demand of the goods. In an action brought by the constable against C., it was held, that he was a mere naked bailee, and that no action would lie against him, until after a demand and refusal of the goods. (a)

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And that the constable not having demanded the goods, and levied the amount of the execution, by a sale of them, within the thirty days, had lost, by his neglect, all claim and title to the possession of the goods.

which horses had not been delivered to the plaintiff, when demanded, according to the tenor of the receipt, &c.

The receipt was proved by the plaintiff, and that the defendants, when the summons was served, confessed that they had given the receipt for the horses, but that the execution which the plaintiff held had run out, and the horses had been taken by another execution.

The receipt, dated the 20th *February*, 1811, referred to the execution for twenty-seven dollars and eighty-one cents, and mentioned that the defendants had received of the plaintiff a pair of horses, the property of *Jedediah Chapman*, the person against whom the execution issued, which they promised "to deliver to the plaintiff on demand, at the house of Captain *Dewey*, in *Durham*." The execution was dated the 18th *February*, and had expired, but was renewed by the justice, on the 1st *April*. The justice gave judgment for the plaintiff, for twenty-five dollars.

Adams, for the plaintiff in error.

Kirtland, contra.

Per Curiam. The plaintiff below was bound to have shown a demand of the horses before suit brought. The defendants were naked bailees, and bound, upon demand, to produce the property, at the place specified in the receipt; but until a demand, there was *no default. There was no precedent debt or duty. The demand was parcel of the contract, and requisite to create the duty. There was, likewise, another fatal objection to the right of recovery. The constable having levied the goods upon the execution, within the twenty days, and delivered them over to the defendants, ought to have demanded the horses, and to have levied the amount of the execution, by the sale of them, within the thirty days. He neglected to do this, and suffered the execution to run out, and thereby lost all just claim and title to the possession of the horses.

Judgment reversed.

(a) But where there is a precedent debt or duty, the bringing of the action is itself a legal demand. *Ernst v. Bastle*, 1 *Johns. Cas.* 319.

CHANDLER against EDSON.

A person cannot lawfully enter on the lands of the *Stockbridge Indians*, and cut and carry away timber, growing thereon, even with their consent. Where a person by a written license from the *peace-makers* of the tribe, entered and cut down trees, of which

IN error, on *certiorari*, from a justice's court. *Edson* brought an action of *trover* against *Chandler*, before the justice, for taking and converting 7,000 pine shingles, the property of the plaintiff. The defendant pleaded not guilty; and specially, that the plaintiff had made the shingles of timber while green, on land, belonging to the *Stockbridge Indians*, and that he had so taken the timber and made the shingles on the land, as a trespasser. The plaintiff replied to the second plea, that he had cut the timber by consent of the "*Peace-makers*," &c. of the tribe or nation.

On the trial, the plaintiff gave in evidence, a writing signed by two *peace-makers* of the *Stockbridge Indians*, dated the

23d November, 1809, giving license to *Joseph Pye*, to cut ten pine trees on their undivided lands, by whoever he thought fit, and to build a hut to work in. One of the *peace-makers*, who was sworn as a witness, testified, that he executed the paper produced, and that the leave was given pursuant to a vote of the nation, and of the *peace-makers*. The plaintiff produced a writing, without date, signed by *Joseph Pye*, giving the plaintiff leave to cut the trees; and it was proved that *Pye* had said that he gave such a license to the plaintiff, but the time when it was given did not appear. It was proved that the plaintiff made the shingles, and that they were, afterwards, in the possession of the defendant. The justice gave judgment for the plaintiff, for twelve dollars and twenty-five cents. The justice, in his return, stated that he did not take into consideration the right of the *Indians* to grant liberty to persons to cut timber on the land, as he was of opinion there was not sufficient proof that the shingles were made on their land.

N. Williams, for the plaintiff in error.

Kirtland, contra.

Per Curiam. The facts stated in the case leave no room to doubt, that the shingles for which *Edson* brought the action, were made by him, from timber which he had cut upon the lands belonging to the *Stockbridge Indians*. If he acquired no right to cut the timber, and make the shingles, by virtue of the license granted by the *peace-makers* to *Joseph Pye*, the property in the shingles still remained in the *Indians*. *Edson* acquired no property in the shingles, as the fruit of his trespass, for if the license was void, his entry must be deemed wilful. (5 *Johns. Rep.* 348. 6 *Johns. Rep.* 168.) The decision of this case, then, turns upon the question, whether a person can, with the consent of the *Indians*, lawfully enter, cut and carry away the timber, growing upon the lands of the *Stockbridge Indians*. The court are of opinion that the entry was unlawful, and contrary to the provision in the *act relative to Indians*, passed 4th April, 1801, (*Laws*, vol. 1. 464.) The first section of that act (sess. 24. c. 147,) prohibits all persons, without the consent of the legislature, from entering on any *Indian* lands, by pretext or color of any right or interest in the same, in consequence of any *Indian* contract. The second section among other things, declares that no person shall sue on any contract made with the *Stockbridge Indians*; and the ninth section declares, that these *Indians* have no power to alienate, or lease, or dispose of their lands, or any part thereof. These several legislative provisions appear to be decisive against the validity of any *Indian* contract or license, to enter and appropriate their timber. If a person cannot enter, under pretext of any interest in their lands, and if they cannot even lease them, and if all contracts with the *Indians* are void, there cannot be a pretence for holding valid the agreement in the case before us. The fourteenth section of the act contains nothing repugnant to the other provisions. It only superadds a penalty against every person who shall enter, and cut down

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he made shingles, it was held, that he was a trespasser, notwithstanding such license, and acquired no property in the timber or shingles. [Vide 1 *R. S.* 719, sec. 11, 12. 3 *R. S.* 350, sec. 1, 2.

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Act 10th, April, 1813. 3 *R. S.* 371, sec. 1. Act 2d, April, 1813.] (a)

(a) Vide *Jackson v. Wood*, 7 *Johns. Rep.* 290, and the cases there collected in note (a).

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the timber on the *Indian* lands, without consent of the *peace-makers*. That consent may exempt him from *the penalty, but will not make the contract valid. There is the same penalty for occupying and improving their lands, without consent; and it cannot surely be said, that the *Indian* consent to occupy and improve their lands, could be valid; for that would be equivalent to a lease of them, and directly contrary to a preceding section in the act.

It was the wise policy of the statute to interdict all individual whites from any negotiation, or any contract with the *Indians*, in respect to their lands, or any interest therein. Such a complete and total interdict was indispensable to save the *Indians* from falling victims to their own weakness, and to the intelligence, and, sometimes, the cupidity, of the whites.

Judgment reversed.

HEMSTRACT against YOUNGS.

On the return of a summons before a justice, the 25th October, the parties joined issue, and a *venire* was awarded, at the instance of the plaintiff, and the justice adjourned the cause to the 1st November, at which time the defendant appeared and demanded an adjournment, which the justice refused, unless he would pay the costs of the *venire*; it was held, that the defendant was entitled to the adjournment, and that the justice had no right to refuse it, on that ground. (a)
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IN error, on *certiorari*, from a justice's court. *Youngs* sued *Hemstract*, before the justice, in trespass, and on the return of the summons, on the 25th October, 1811, the parties appeared, and joined issue. The plaintiff demanded a jury, and the justice thereupon issued a *venire*, which was delivered to a constable, and adjourned the cause to the 1st November, on which day the parties appeared, and the defendant demanded an adjournment, which the justice refused to grant, unless the defendant would pay the constable's fees on the *venire*, and the jurors' fees, which the defendant refused to do. The cause was then tried, and the jury found a verdict for the plaintiff, for one dollar and fifty cents, on which the justice gave judgment.

Per Curiam. There is nothing in the return from which we can infer, that the first adjournment was at the defendant's request; and when the second adjournment was moved for by the defendant, we are to presume, that he offered to comply with the conditions, requisite to entitle him to an adjournment, under the fifth section of the act, as the justice put his refusal to grant the motion on a different ground, and one which he was not authorized to take. The defendant must have been entitled to the adjournment as of right. There does not appear to have been any *delay, or want of due diligence on his part which could bring his case within the decision of *Powers v. Lockwood*; (*ante*, 133;) and he was clearly entitled to the adjournment.

Judgment reversed.

(a) Vide note (a) to *Powers v. Lockwood*, *supra*, 133. *Sebring v. Wheldon*, 8 Johns. Rep. 458. *Cross v. Moulton*, 15 Johns. Rep. 469.

SAGE against BARNES.

In an action before a justice, for the penalty

IN error, on *certiorari*, from a justice's court. *Barnes* brought an action against *Sage*, before the justice, to recover

the penalty of six dollars, for obstructing the highway, under the nineteenth section of the act.^(a) The parties joined issue, by consent. The defendant alleged that the road in question was a disputed road; that the land was claimed by the defendant, and that there were suits pending in a higher court, to try the validity of the road; and contended, therefore, that the justice had no jurisdiction. No plea of title in writing was interposed by the defendant, nor was any evidence given by him that any action was pending. The justice, therefore, disregarded these allegations; and the obstruction of the road was proved by several witnesses. The plaintiff produced a copy of the record of the road, containing a particular description of it. One witness proved that he had been called to work on the road, and several testified that they had travelled on it, as a public road; and the defendant declared that he had appealed to the judges of the Court of Common Pleas for the improper establishment of the road, who had refused to grant him any redress. The justice, in his return, stated, that it was proved satisfactorily, that the road was established as a public highway, and had been obstructed by the defendant. The defendant interposed no plea of title in writing. He produced the certificate of two attorneys, that a suit was pending in the Court of Common Pleas between the defendant and *A. Hotchkiss*, in which the validity of the road was called in question; he also produced a certificate of the clerk of the court to the same effect. The justice gave judgment for the plaintiff, for five dollars.

Per Curiam. The judgment must be affirmed. If any plea of title was admissible in this case, no such valid plea was offered. It was necessary that it should have been in writing.^(b) The plea, or rather suggestion, that there were other suits pending, in a higher court, to try the validity of the road, was properly rejected. It had neither form nor substance. But the evidence on the trial shows, that such suits were between other parties, and would, in no way, affect the present action. The defendant admitted, on the trial, that he had appealed from the decision of the commissioners of highways, to the judges of the Court of Common Pleas, who had refused to give him relief. It was unnecessary for the plaintiff to show all the preliminary steps to the laying out of the road. It was enough for him to show the record thereof, and that it was opened and used as a public highway. Judgment affirmed.

BOWDITCH against SALISBURY.

IN error, on *certiorari*, from a justice's court. *Salisbury* sued *Bowditch*, before the justice, by warrant. The plaintiff delivered no written declaration; but stated to the justice that he claimed a certain book account, and also for a settlement of four several notes which the defendant had received from him

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(a) 1 R. S.
521, sec. 102.

for obstructing the highway, under the act, (sess. 24, c. 186,) a plea of title is not valid, unless reduced to writing; and it is sufficient, if the plaintiff produces a copy of the record of the establishment of the road, as a public highway. It is not necessary that he should prove all the proceedings preliminary to the laying out of the road.

(b) 2 R. S.
236, sec. 59.
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Where a plaintiff, before a justice, declared for a balance of a book account, and also for the set

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tlement of four several notes detained by the defendant, and claimed damages to the amount of 25 dollars, it was held that tho' the four notes exceeded in amount 100 dollars, yet as the plaintiff claimed only 25 dollars damages, the justice had jurisdiction. (a)

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Where a defendant is brought up on a warrant and issue is joined between the parties, the justice may, on (a) 2 R. S. 225, s. 2.

the request of the defendant, under the first section of the

(b) Vide 2 R. S. 239, sec. 73. act, adjourn the cause for 1 day, or for a less time than 3 days.

(a) Vide *Ab-ernathy v. Ab-ernathy*, 2 Cowen, 413.

to collect; and that his principal object in the action was a settlement of the notes, which the defendant detained against good faith; and laid his damages at twenty-five dollars.

The defendant pleaded *non assumpsit*, and a set-off of certain notes. By the request of the defendant, the cause was adjourned to the next day. There was a trial by jury, who found a verdict for the plaintiff, for nineteen dollars and twenty cents.

The evidence given at the trial was not stated in the justice's return.

The plaintiff in error objected, 1. That the declaration of the plaintiff below was bad, as it did not distinctly and specifically state the nature and amount of his demand; 2. That the amount of the notes exceeded the sum for which the justice had jurisdiction, and that the justice or jury had no power to go into an examination, and decide on all demands between the plaintiffs; 3. That the justice had no right to adjourn the cause for a shorter time than three days.

**Per Curiam*. The objections taken to the justice's return are untenable. The declaration was not in writing; but from the statement of the plaintiff's demand, it appeared to be founded on an unsettled book account, and upon certain notes which the defendant had received to collect. Although the nominal amount of the notes was beyond the justice's jurisdiction, yet the plaintiff claimed only twenty-five dollars; (a) and he might relinquish all beyond that sum, which he must be presumed to have done, by demanding only twenty-five dollars. The adjournment by the justice for one day was legal, under the first section of the act. (b) The defendant did not require a longer adjournment, or bring himself within the second section of the act. The justice does not profess to return all the evidence. The court cannot, therefore, upon the merits, determine whether or not justice has been done. If any thing, not appearing on the return, took place upon the trial, of which the plaintiff in error complains, he should have procured a more complete return.

Judgment affirmed.

WALLSWORTH against MEAD AND GREEN.

An action lies by the overseers of the poor, on an order of bastardy to recover of the putative father, the weekly sum directed by such order to be paid for the maintenance of the child.

Such order, unless appealed from, is con-

IN error, on *certiorari*, from a justice's court. *Mead and Green*, as overseers of the poor of the town of *Norwich*, brought an action of debt against *Wallsworth*, before the justice, to recover twenty-five dollars, on an order of bastardy, made by two justices of the peace, the 18th of *September*, 1801, which required *W.* to pay the weekly sum of seventy-five cents to the overseers of the poor, for the first year the child should be chargeable to the town, and fifty cents for every week thereafter, that the child remained chargeable. The plaintiffs demanded seventy-five cents a week, from the date of the order to the 10th of *May*, 1811. The defendant pleaded the general issue, and, specially, that no suit would lie on

the order, it being illegal and void. The order, which was produced and read, directed the defendant to pay the weekly sum of seventy-five cents for twelve months, provided the child was so long chargeable.

The defendant produced in evidence a recognisance, dated the 28th *August*, 1810, taken for his appearance at the next General Sessions of the Peace, to abide and perform such order and orders, as should be made pursuant to law. He also gave in evidence *another recognisance, taken at the sessions, in *October*, 1810, for his appearance at the then next sessions. It appeared from the record of the court, that the defendant, at the sessions in *January* following, was discharged from his recognisance. The plaintiffs objected to this evidence, but it was admitted by the justice.

The plaintiffs then offered parol evidence to explain for what, and how the recognisances were taken and discharged. The defendant objected to such parol proof, but it was admitted by the justice. It was proved, that after notice of the order was served on the defendant, the plaintiffs received notice of an intended appeal from the order, to the *October* sessions. At the sessions, in *October*, the appeal was moved, and objected to by the plaintiffs, for want of sufficient notice in writing. The appeal was continued over to *January*, when the defendant appeared, and refused to prosecute his appeal, and his recognisance was thereupon discharged.

The defendant then objected that the plaintiffs were not entitled to recover, without showing that the child had actually been chargeable. The justice admitted the order as *prima facie* evidence of the child's being chargeable; but said that the defendant might show payment, or that the child had been maintained without any expense to the town. No such evidence was given, and the justice gave judgment for the plaintiffs, for twenty-five dollars.

Per Curiam. The principal objection relied upon in this case is, that no action will lie upon the order in question. The objection is untenable. That order is an adjudication of a court of magistrates of competent authority, and conclusive upon the defendant, unless appealed from to the general sessions. Whether such appeal had been made, or can now be made, were questions not properly before the court. It was enough for the justice that such order was in full force, and not reversed or modified by the sessions. It was equivalent to a judgment that the defendant should pay the weekly sum of seventy-five cents. The order was *prima facie* evidence of the demand; and it rested with the defendant to show himself exonerated from the payment, in order to avoid the recovery against him. This seems to be the light in which such orders were held by this court, in the case of *Sweet v. The Overseers of Clinton*. (3 *Johns. Rep.* 26.) The judgment must, therefore, be affirmed.

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clusive on the defendant. It is *prima facie* evidence of the plaintiff's demand; and it lies on the defendant to show its reversal or modification by the sessions, or other matter of discharge. (a)

(a) Acc. *People v. Relyca*, 16 *Johns. Rep.* 155. See *Donnelly v. Rockefeller*, 4 *Conn.* 253. *S. C.* in error, 8 *Conn.* 623.

Judgment affirmed.

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CLINTON

v.

STRONG.

An action of debt for an escape against a sheriff, is cognizable in a justice's court.

*JANSEN, LATE SHERIFF, &c. against STOUTENBERGH AND TELLER.

IN error, on *certiorari*, from a justice's court. *Stoutenbergh* and *Teller* brought an action of *debt* against *Jansen*, late sheriff of *Ulster*, before the justice, for the escape of one *Smith*, who was a prisoner on execution, in his custody, at the suit of the plaintiffs, for fifteen dollars and eighty-four cents.

The plaintiffs proved, by a constable, that he delivered *Smith*, with the execution, into the hands of the defendant; and the defendant confessed that *Smith* was out of the gaol limits. The defendant moved for a nonsuit, on the ground that the names of the plaintiffs were written *Tobias L. Stoutenbergh* and *Teller*, and contended that there was a variance between the names, and those in the execution, but did not produce the execution, though the justice called on him for it.

The justice refused the nonsuit, and gave judgment for the plaintiffs.

It was objected, by the plaintiff in error, that the justice had no jurisdiction of an action of debt against a *sheriff* for an *escape*.

Per Curiam. The judgment must be affirmed. The objection of want of jurisdiction in the justice, is untenable. The action falls within the denomination of actions cognisable in justices' courts. There is nothing special in the proceedings, or judgment to be given, which can take away the jurisdiction. The magistrate is competent to afford the sheriff all the relief to which he would be entitled in any other court, relative to staying proceedings against him. And there can be no reason why jurisdiction should be denied. The motion for a nonsuit was properly overruled. There was no variance between the plaintiffs' names in this suit and the one against *Smith*. No objection having been made to any of the testimony, at the trial, it is now too late to hear any.

Judgment affirmed.

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An American ship, with a cargo owned by American citizens, sailed from England to New-York, the 2d December, 1810, before the proclamation of the President of the United States of the 2d November, 1810, was known there, and arrived at

IN error, on *certiorari*, from the Justices' Court of the city of *New-York*. *Selah* and *James Strong* brought an action in the court below, against *C. Clinton*, clerk of the District Court of the *New-York* district, for money had and received to the use of the plaintiffs, to recover back thirty-one dollars, with interest. On the trial of the cause, in the court below, on the 14th *November*, 1810, the following facts appeared in evidence.

The plaintiffs were *American* citizens, and sole owners of the ship *Jane Barnes*, an *American* vessel, and of sixty-seven tons of salt, part of her cargo. The ship sailed from *Liverpool*, in *Great Britain*, on the 2d *December*, 1810, bound to

New-York. At the time of her sailing, the proclamation of the President of the *United States*, dated the 2d *November*, 1810, was not known at *Liverpool*, nor did the captain, officers or crew of the ship, hear or know of it, until their arrival at *New-York*, on the 18th *February*, 1811. On the arrival of the ship, she was regularly reported to the custom-house, by the captain, who exhibited the manifest of the cargo, and paid the customary fees. On the 19th *February*, the ship and cargo were seized by order of the collector of the customs of the port of *New-York*; and on the 27th *February*, a libel was filed against the ship and cargo, in the District Court of the *United States*, for the *New-York* district, for a violation of the acts of congress relative to the commercial intercourse *between the *United States*, *Great Britain* and *France*, and their dependencies, called the *non-intercourse acts*.

The plaintiffs below gave in evidence an act of congress, entitled "An act supplementary to an act entitled an act concerning the commercial intercourse between the *United States*, *Great Britain* and *France* and their dependencies," &c. passed the 2d *March*, 1811; and they proved, by the surveyor of the port, and the deputy collector, that after that act was known in *New-York*, to wit, on the 8th *March*, the seizure of the ship and cargo was withdrawn, and both were liberated, as far as the custom-house and its officers were concerned; and on the same day they were permitted to be regularly entered at the custom-house, and a regular permit granted for landing the cargo.

William H. Smith, one of the inspectors of the custom-house, testified, that on the 19th *February*, he took possession of the ship and cargo, by order of the custom-house. That on the 8th *March*, 1811, the plaintiffs presented him the permits for landing the cargo, and demanded the sixty-seven tons of salt, when the marshal of the district, who was then on board, prohibited the landing and delivery of the goods; that from the 19th *February* to the 8th *March*, the witness considered the ship and cargo in his custody, and prior to the 8th *March*, did not see the marshal or his deputy, nor did he suppose, until that time, that the marshal claimed any possession or control of the ship and cargo.

It was proved that on the 12th *March*, the plaintiffs demanded the delivery of the vessel and the salt, of the marshal, who replied, that he could not deliver them up; until certain bills or fees of the officers of the District Court, and, among others, the bill of the defendant, which he showed to the plaintiffs, were paid. The bills together amounted to more than one hundred dollars.

The plaintiffs then proved the receipt of the defendant, dated the 12th *March*, 1811, for thirty-one dollars, for clerk's fees, on two libels, against the ship and cargo.

The marshal, who was a witness for the defendant, said, that he did not recollect the answer he gave to the plaintiffs, but his general answer to applicants in such cases was, that he would

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New-York, the 18th *February*, 1811; and was regularly reported to the custom-house. On the 19th *February* she was seized by the collector

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of the customs, for a breach of the *non-intercourse acts*, and libels filed against the ship and cargo, on the 27th *February*. After the act of congress of the 2d *March*, 1811, the seizure of the property was withdrawn, and the vessel and cargo were liberated, as far as the custom-house and its officers were concerned; but they were detained by the marshal, who refused to deliver them without an order from the District Court, or until the costs of the libels were paid. The owners paid the costs of the attorney of the district, and the fees of the clerk of the court, who refused to give an order for the delivery of the property, until his fees were paid. The owners, afterwards, brought an action for money had and received against the clerk of the District Court, to recover back the amount of the fees so paid to him. It was

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held, that the vessel and cargo were not equitably liable to condemnation; and that the seizure having been withdrawn, the owner was not subject to costs, which are the consequence of some default, and are not awarded, at common law, or in the instance court, against an innocent party.

That the payment of the costs was not a voluntary act, having been exacted by the officer, *colore officii*, as a condition of the redelivery of the property: and that the costs having been illegally exacted, might be recovered back, by an action of *indebitatus assumpsit*, at common law. Though it belongs exclusively to the court, in which a suit has been originally instituted, to award costs, yet if the suit be discontinued, for want of cause, without any decision of the court, the exaction of costs is an act *in pais*, and the money may be recovered back, by suit a-

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gainst the officer, in any other court of competent jurisdiction. (a)

(a) Vide *Ripley v. Gelston*, and note (a) *supra*, 201.

not deliver the property, without an order of the court, or of the clerk of the court, and on such order he should deliver it, without costs. The witness produced the monitions issued on filing the libels, in which the return days were left blank. He did not know when they were *delivered to him, nor where they were served. No district court was held from the 1st February to the 1st April, 1811.

S. B. Romaine, Esq. acted in behalf of the district attorney, in March, 1811, and testified that the libels were filed by his direction. That after the act of the 2d March, 1811, *J. Strong*, one of the plaintiffs, applied to him to have the vessel and cargo given up; but he refused, unless the fees which had accrued, in consequence of filing the libels, were first paid; and he absolutely refused to give any order, until the fees were paid. The attorney, on the 12th March, 1811, wrote an order requesting the defendant, the clerk of the court, to give an order for the delivery of the cargo, on payment of the fees. The fees of the district attorney, amounting to thirty-four dollars, were paid by the plaintiffs, on the same day, and at the same time with the clerk's fees. *Strong* asked the amount of the costs, and being told the amount, complained of the hardship of being compelled to pay it.

The deputy clerk testified, that it was usual to issue monitions with blank return days. The order for the delivery of the goods was delivered to the deputy marshal. That he would not have given the order to any but the marshal or his deputy, nor to either of them, without the payment of the fees, nor without an order from the district attorney. There was no order of the District Court to deliver up the vessel and her cargo; but the order was the act of the clerk, when there was no court, or judge present, and was delivered to the marshal, in consequence of the order of the district attorney.

The deputy marshal testified, that on the day he received the monitions, he took possession of the ship and cargo, but put no person on board, though he went daily to visit the vessel, and see that all was safe; and considered them as at the risk of the marshal.

The court below gave judgment for the plaintiffs, for the thirty-one dollars, with the interest and costs.

Griffin, for the plaintiff in error, contended that the action could not be maintained against the defendant. He observed that if there was any *duress* in the case, it was not by the defendant, who, as the clerk of the District Court, obeyed the directions of the proper officer. The fees were in fact due. A libel had been filed, which was the commencement of a regular suit in the District Court. (3 *Johns. Cas.* 145.) A monition had also issued, and fees had accrued, before *the act of the 2d of March, 1811. The right of the defendant to his fees had become vested before the passing of that act, and could not be divested. The act made no provision for the cost which had accrued. The costs must be paid by some person. It may be said that where a suit is settled, without mentioning the costs,

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each party must pay his own costs ; but this could not be the intention of the act of the 2d of *March*. It conferred a favor on the plaintiffs, by exonerating them from the penalties they had incurred under the previous statutes. The owner accepted the benefit *cum onere*, subject to the payment of costs. It cannot be presumed that the *United States* intended to pay the costs.

It may be said, that these costs were not due ; but the District Court had exclusive jurisdiction over the subject matter ; and its decision as to the costs must be conclusive. Besides, one court never undertakes to decide on the costs accruing in another court ; for the fees and costs depend on the usage and practice of the courts. (3 *Bac. Abr.* 121. *Fee A. Co. Litt.* 368. *Prec. in Ch.* 551. 3 *Caines' Rep.* 171. 1 *Johns. Cas.* 515.) And as the District Court acted in this respect as an admiralty court, (4 *Cranch's Rep.* 443,) it would be peculiarly improper for a common law court to interfere as to the costs. Admiralty courts have a peculiar law, and peculiar usages of their own ; and it is a common practice for such courts, though they acquit the property, to oblige the owner or claimant to pay the costs, over which they have an absolute discretion.

Again, the payment of the costs was voluntarily made, pending a course of judicial proceedings. In *Irving v. Wilson*, (4 *Term Rep.* 485,) and other cases which may be cited, there was no suit pending : and the doctrine of those cases is greatly weakened by the decision in the case of *Kimber v. Hall*. (1 *Esp. Cas.* 84.) But here was a *lis pendens*, and a court of competent power to give redress if application had been made for that purpose. Where money is paid in a cause actually pending in a court having jurisdiction, and which, if application is made, has the power to interfere, there, if the money is paid, however illegal or unjust the demand may be, it can never be recovered back. Every person is bound to take care of his own rights, and vindicate them in due season, and in proper order ; (1 *Johns. Cas.* 502,) and if a party having the means of defence in his power, neglects to use them, he is for ever precluded. (4 *Johns. Rep.* 510.) The principle is, that where a party has his day in court, and neglects to make his defence, he cannot afterwards resort to an action to recover back the *money he has paid. (5 *Esp. Cas.* 277. 2 *Esp. Cas.* 546.) In *Mariott v. Hampton*, (*Term Rep.* 269,) the decision of Lord *Mansfield*, in *Moses v. M'Farlan*, was wholly disregarded, and it was held that where money has been paid by compulsion of a suit, or legal process, it can never be recovered back, though found, afterwards, not to be due. Though it is stated in the return that no district court was held from the 1st of *February* to the 1st of *April*, yet this court are bound to presume, that if proper application had been made to the judge of that court, he would have held a court, and given an order on the subject. But even admitting a delay in that court, that circumstance furnishes no ground for the interference of this court, nor for an action to recover back the costs which the party has voluntarily paid.

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Hoffman, contra. It is said that the costs were due and claimable in this case. This involves the construction of the act. (11th Cong. sess. 3. c. 96.) The first section of the act declares, that "no vessel, owned wholly by a citizen or citizens of the *United States*, which shall have departed from a *British* port prior to the 2d of *February*, 1811, and no merchandize, owned wholly by a citizen or citizens of the *United States*, imported in such vessel, shall be liable to seizure or forfeiture, on account of any infraction, or presumed infractions of the act to which this act is a supplement." The terms of the act are clear and explicit. Neither the *Jane Barns*, nor her cargo, could be seized, or forfeited. An end was put to all proceedings. The plaintiffs, or the *United States*, absolutely relinquished all right or claim. Either the *United States*, or the custom-house officer, at whose instance the libel was filed, was the plaintiff; and whoever is to be deemed plaintiff, he abandoned the suit without any reserve or condition whatever. If a debtor of the *United States* is discharged by an act of congress, can the marshal detain him until his fees are paid, or is the debtor obliged to apply to the court of the *United States* for his discharge?

In *Yeaton and others v. The United States*, (5 Cranch, 283,) a suit attached, and the cause regularly proceeded, and, pending the appeal, the act of congress expired; and the Supreme Court reversed the decree of the Circuit Court without costs.

The reversal restores the party to the same state he was in before. In the case of *St. John's College v. Murcott*, (7 Term Rep. 259,) a sheriff's officer, being in possession of a tenant's effects, under an outlawry, made a distress for rent, and sold the goods. The outlawry was *afterwards reversed, and it was held that the officer was liable to refund the money for which the goods were sold. *Ashhurst*, J. said, the instant the outlawry was reversed, the judgment was mere waste paper, and the rights of the parties were restored to the same situation as if no outlawry had taken place.

It is said that the District Court has exclusive jurisdiction of this question. But this is an action to recover back money which the defendant has received contrary to conscience and equity. He is liable to refund only what he has so received. (*Cowp.* 418.) Though the plaintiff may have another remedy, by application to that court, it does not deprive him of his right of action at the common law. It is true the District Court might have decided the question summarily, on motion; but the plaintiff has a right to have his cause tried by a jury. But the District Court had no jurisdiction of this cause. These parties being both citizens of the same state, could not bring this action in that court. After the passing the act of the 2d of *March*, 1811, on a demand of the property, and a refusal to deliver it up by the marshal, the plaintiff might have brought an action of *trover* for his property in this court. He was not bound to wait for the decision of the District Court. The legis-

lature, the sovereign power of the country, had ordered the property to be restored ; and the marshal, on his refusal, became a *tort-feasor*. It is said that this case belongs to the Admiralty Court, which has peculiar rules about costs. Though a court of admiralty has the power to distribute prize-money among the captors, and pay to each his share ; yet when the prize has been condemned and sold, and converted into money, any one of the captors may bring his action, at common law, for money had and received, against the agent who withholds his share. (4 *East's Rep.* 258. 3 *Bos. & Pull.* 257. 2 *East's Rep.* 220.) And before a condemnation, a captor may assign his share, and the assignee may maintain an action for money had and received against the agent who should, after condemnation, refuse to pay it over. (1 *Wils.* 211.)

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Again, it is said that the money was paid in a regular course of judicial proceedings ; but after the act of the 2d of *March*, 1811, there was an end to all judicial proceedings. The property was placed in the same situation as if a seizure had never been made.

The only question is, whether here was a *voluntary* payment. We contend that every officer acting in his office, and receiving fees, *coloro officii*, can never, if those fees are illegal, allege that the plaintiff paid them voluntarily. (*Willes*, 536. 2 *Sid.* 4 *Loft*; 753. 1 *Bos. and Pull.* 139.) If a revenue officer seize *goods as forfeited, which are not liable to seizure, and take money of the owner to release them, the latter may bring an action of *indebitatus assumpsit*, for money had and received, to recover it back. (4 *Term R.* 485. 553. *Cowp.* 69. 805.)

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T. A. Emmet, (Attorney General,) on the same side, was stopped by the court.

Per Curiam. The plaintiff in error contends, 1. That costs were claimable from the owners of the property ; 2. That this was, at least, a question for the exclusive cognisance of the District Court ; 3. That the payment of the costs was voluntarily made, pending a course of judicial proceeding.

1. As the defendants' vessel sailed from *England*, before notice of the president's proclamation of the 2d *November*, 1810, was or could have been known there, and as she arrived in the *United States*, soon after the 2d of *February*, 1811, she was not, in justice and equity, liable to condemnation for a breach of the non-intercourse law. The seizure was, consequently, withdrawn, and the vessel and cargo liberated, upon notice being received of the act of congress of the 2d *March*, 1811, which exempted such vessels from the operation of the non-intercourse law. To exact costs from the defendants, under such circumstances, would be as oppressive as it would be illegal. The vessel, under the equity of the first law, and by the express terms of the supplementary act, was not liable to seizure or forfeiture, and there was, therefore, no ground to exact costs for the seizure and libel. Costs are the consequence of some *default* of the party against whom they are awarded, and are never, at least in the common law courts, and in the *instance*

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court, assessed against an innocent party, who is not chargeable with any default.

2. If the costs have been illegally exacted in this case, they are recoverable back by a suit at common law. There is no statute, nor rule, which confines the party who seeks redress for such extortion, to the court in which the suit had been originally instituted. It belongs to a court in which a suit is brought to award costs when they are to be awarded. This is a matter exclusively incident to such court. No other court can do it; but if the suit be discontinued, as this was, for want of cause, and without being brought before the court for decision, the exaction of costs is an act *in pais*, for which the officer may, indeed, be punished *by that court for his mal-practice, but the money may be recovered back in any other court having competent jurisdiction. The demand becomes a new, distinct cause of action, which is no more cognisable in the District Court than any other like cause of action. Whether the seizure of the property was well made or not, was a question belonging exclusively to the District Court; but after the suit was discontinued by the parties seizing and prosecuting, on the ground that the seizure was not warranted, the jurisdiction of the court in the case was at an end, and the exaction of costs was a subsequent act of the officer, wholly distinct from the prosecution.

3. The payment of the costs could not be considered a voluntary act. They were exacted by the officer, *colore officii*, as a condition of the redelivery of the property. It would lead to the grossest abuse, to hold a payment made under such circumstances, a voluntary payment, precluding the party from contesting it afterwards. Judgment affirmed.

ROBERT S. VAN RENSSELAER *against* PHILIP S. VAN RENSSELAER.

A. by a permanent lease, conveyed a farm to B., reserving all the mill-seats with the privileges thereof. C. purchased the farm of B., and D., while in possession of

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the farm under C., entered into an agreement with A., by which A. agreed to permit D. to erect a dam and mill, &c. on a creek, within the

THIS was an action of trespass. The declaration contained five counts; for breaking the plaintiff's close; taking down his saw-mill, flume, &c. and carrying away and converting the materials, &c. and for taking and carrying away divers quantities of timber, boards, &c. The defendant pleaded the general issue.

The cause was tried at the *Albany* Circuit, in *April*, 1812, before Mr. Justice *Spencer*.

The plaintiff gave in evidence a durable lease from *Stephen Van Rensselaer* to three persons of the name of *Slingerland*, dated the 28th *November*, 1788, for a farm in *Bethlehem*, in *Albany* county, including the premises on which the mill, &c. were erected, but excepting the mill-seats, with the privileges necessary for the same; also an *agreement*, dated the 6th *August*, 1802, between *Stephen Van Rensselaer* and the plaintiff, in which the former agreed to "permit the said *Robert* to erect a dam and saw-mill, on the *Norman's* creek,

within the bounds of the farm which, on the 28th of November, 1788, was conveyed by lease to *P. A. & R. Slingerland*; the terms and conditions on which the said *Robert* is to hold the said mill to be agreed upon, and in case of disagreement, as to terms and condition, the said *Robert* to yield and deliver up the said saw-mill and premises to the said *Stephen*, upon condition that the said *Robert* be paid a reasonable compensation for erecting the said saw-mill and dam."

Several witnesses testified as to the cost and value of the mill, dam, flume, &c.

It appeared that the dam was carried away by a *freshet*, in 1804, so that the mill was not afterwards used by the plaintiff.

It was admitted that *Maria Van Rensselaer*, the mother of the plaintiff, had purchased the title of the *Slingerlands*, and that the plaintiff possessed the farm, under her, at the time he entered into the agreement aforesaid, with *Stephen Van Rensselaer*; and that in the spring of 1804, *Maria Van Rensselaer* sold and released the farm, by metes and bounds, as described in the original lease, to the defendant.

In 1805 the plaintiff demanded compensation for the mill, &c. from the defendant, but the defendant refused to make any, alleging that he had purchased the mill with the farm. The plaintiff forbid the defendant from pulling down the mill. The defendant's counsel, on this evidence, moved for a nonsuit, but the motion was overruled by the judge. The defendant then gave in evidence a receipt given by the plaintiff, in behalf of his mother, for the purchase-money of the farm. It was proved that *Stephen Sanders* went into possession of the farm in April, 1806, under the defendant, who offered to let the mill to him, but *Sanders* declined taking it. The mill was taken down in the autumn of 1806, and the land on which it stood was, from that time, enclosed by the fence of *Sanders*, and pastured by him, until about two years since, when he left the farm. The site of the mill was a barren spot, yielding nothing but a little grass. The question of damages was submitted to the jury, under the direction of the judge, and a verdict was found for the plaintiff, for five hundred dollars.

A motion was made to set aside the verdict, and for a new trial.

Henry and Van Vechten, for the defendant, contended, that the motion for a nonsuit was improperly overruled by the judge, as the plaintiff, by his own witness, showed that he was out of possession when the mill was demolished, in 1806.

To maintain an action of trespass *quare clausum fregit*, the plaintiff must show an actual and legal possession. (1 *Johns. Rep.* 511. 3 *Johns. Rep.* 471. 7 *Johns. Rep.* 273. 276. *Ante*, 61, 62.

If the plaintiff be disseised, he cannot maintain an action for an injury done to the freehold, until a re-entry by him, unless it be for the mere act of ouster. *Bull. N. P.* 86. 11 *Co.* 51. 4 *Johns. Rep.* 157. 2 *Roll. Abr.* 553.

(a) To maintain trespass the plaintiff must show an actual possession of the premises, or that he is entitled in remainder or reversion, or in case the premises are vacant, that he has the legal title which draws to it the possession. *Wickham v. Freeman*, 12 *Johns. Rep.* 183. *Vide Stuyvesant v. Dunham*, *supra*, 61.

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bounds of the farm, so conveyed to B. C. afterwards sold the farm as described in the lease, to E., and D. having quitted the possession, E. pulled down the mills erected by D. who thereupon bro't an action of trespass *quare clausum fregit*, against E. It was held, that the entry of D. under the agreement with A., and the erection of the mill, &c. was, so far, a severance of the freehold, and the mill thenceforth became a distinct and independent close, and did not pass to E. by the conveyance of the farm, under the lease: and that D. having the right, the mill, though no longer in his actu

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al possession, remained his close, for the breach of which he might maintain trespass against E. (a)

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ham, supra*, 61.

To maintain trespass for goods taken, there must be an actual or constructive possession proved. (8 *Johns. Rep.* 434. 5 *Bac. Abr. Trespass*, (C. 2.) 16, 18.)

The plaintiff not only failed to show a title, but rested merely on his agreement.

In *Heermance v. Verney*, (6 *Johns. Rep.* 5,) it was decided that a person could not enter on the land of another, to take a personal chattel belonging to himself, without being a trespasser. There can be no constructive possession, where the party in possession demolishes the freehold.

The verdict is not only against law and evidence, but the amount of damages found by the jury is excessive and erroneous. They could not find damages for an injury to the freehold, but merely for the value of the materials after they were severed; not for the mill itself, but only for the timber, &c. after it was demolished. The value of these was not proved to be more than two hundred and eighty dollars.

Parker and Champlin, contra. The reservation to *Stephen Van Rensselaer*, of the mill-seat, &c. was good, and having entered under the lease, the mill-seat must be considered his freehold, as against the defendant. Though the plaintiff quit- ted the farm purchased from *Maria Van Rensselaer*, yet he did not thereby abandon the mill, or part with the freehold he had in it. Having the right, and having had the possession, it was not necessary that he should have a continued actual possession, every day, to enable him to maintain the action. A person who has the freehold, continues to be the owner, and has the legal possession, though he does not occupy the premises.

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*The term *close*, signifies the *interest* in the soil, not a mere enclosure. *Trespass* lies, however temporary be the plaintiff's interest, and though it be merely in the profit of the soil. (*Chit. Pl.* 173, 174. 6 *East*, 154. 602. *Co. Litt.* 4. b.)

This case is much stronger than that of *Stewart v. Dough- ty*, (*Ante*, 109,) in which it was decided that where a lessee, having a right to a crop, as *emblements*, sold his right to a *third* person, who entered to reap the crop, but was driven out by the lessor, trespass *quare clausum fregit* would lie at the suit of the purchaser of the lessee's interest in the crop.

The question of damages was fairly submitted by the judge to the jury, and the verdict ought not, therefore, to be disturbed on that ground.

Per Curiam. By the original lease from *Stephen Van Rensselaer* to the *Slingerlands*, he reserved to himself the mill-seats, with the privileges necessary therefor; consequently, the mill-seat and ground sufficient for the use of the mills, never passed to them. The agreement between *Stephen Van Rensselaer* and the plaintiff vested the latter with all the rights of the former, until the plaintiff was paid a reasonable compensation for erecting the saw-mill and dam, but, at all events, it rendered the plaintiff a tenant at will. The sale by *Maria Van Rensselaer*, to the defendant, being only co-ex-

tensive with the right held by the *Slingerlands*, did not, and could not, pass that part of the premises on which the saw-mill and dam were erected, because they were never granted to the *Slingerlands*. When *Stephen Van Rensselaer* gave the plaintiff a right to enter and hold the interest reserved out of the *Slingerlands'* lease, the entry and erection of a mill-dam, and saw-mill, was a complete severance of the freehold, and it became a distinct and independent *close*. The circumstance of the dam's being carried away, and the non-user of the mill thereafter, did not give to those vested with the right of the *Slingerlands*, any interest whatever, either in the dam or mill; but, in point of law, the possession of them resided in the tenant of *S. Van Rensselaer*, who did no act destructive of that tenancy. In point of fact, the defendant had not the possession of the mill, or dam, until he entered and did the acts complained of as trespasses.

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The fallacy of the argument of the defendant's counsel, relative to the possession, is founded on a supposition that the defendant's occupancy of the farm was necessarily an occupation of the mill-dam; this is wholly incorrect, if they were distinct and independent *hereditaments*. That they were so, results from the reservation in the lease, and the actual entry under it.

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In the spring of 1806, the defendant put *Sanders* in possession, offering to let him have the mill, but he declined taking it; and there is no evidence that the defendant ever possessed the mill or dam, till he demolished both. The plaintiff having erected the mill and dam, under authority from *Stephen Van Rensselaer*, in whom the right resided, his tenancy never having been determined, on what principle can the defendant, who appears without the color of right, appropriate to himself the plaintiff's property? Admitting that the possession of the mill and dam was vacant, it, nevertheless, was the *close* of him who had the right; and for violating that right, trespass is the appropriate remedy. (1 *Chitt.* 174.)

A landlord may maintain trespass for trees, or other property excepted in the lease, and any possession is sufficient, as against a wrong doer. (1 *Chitt.* 176.)

There is no solidity in the objection to the form of the action, nor to the plaintiff's right to recover. The objection to the amount of the verdict is equally untenable. The jury did right in giving the plaintiff the value of the mill and dam as it stood, and might have gone higher. Motion denied.

JENNER against JOLIFFE.

THIS was an action of trespass on the case. The declaration contained four counts: The first and second counts were in *trover* for a quantity of oak timber; the third was for the defendant's attaching, by process out of the Court of King's

Where goods
are seized by
virtue of legal
process, and
are in the cus-
tody of the

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law, trover will
not lie for them.
(a)

An officer in-
trusted by the
common law, or
statute, is liable
to an action for
negligence in
the perform-
ance of his trust
or duty: or for
fraud or neglect
in the execution
of his office. (b)

If an officer
having authori-
ty to attach the
goods of a per-
son, keeps them
in an unsafe
place, or expo-
ses them to de-
struction, he is
liable for the
damages sustain-
ed: and it seems
that if a plaintiff,
on a process of
attachment, di-
rects or causes
an officer, so to
act, as to mis-
behave in the
execution of his
office, and pro-
duce the loss or
destruction of
the goods in his
custody, the
party injured
has his election
to bring his ac-
tion either a-
gainst the prin-
cipal or the
officer.

(a) So goods
taken in execu-
tion being in the
custody of the
law, cannot
be replevied.
*Thompson v.
Button*, 14
Johns. Rep. 84.
Vide *Farring-*

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ton v. Payne,
15 *Johns. Rep.*
431.

(b) Vide *Burke
v. Trevitt*, 1 *Mu-
son*, 96. *Bart-
lett v. Crozier*,
16 *Johns. Rep.*
50.

Bench in *Quebec*, the timber of the plaintiff, and so negligently and carelessly behaving, &c. that the timber was lost. The fourth count was for a malicious prosecution of the plaintiff.

*The cause was tried at the *Clinton* circuit, in *July*, 1812, before Mr. Justice *Yates*. It was proved that *Jenner*, about the 18th *June*, 1808, came to the port of *Quebec* with a raft of timber. The plaintiff said to the defendant that he would deliver only 8,000 feet of timber to the defendant, unless he would give the then market price, which was three hundred and fifty dollars per thousand, for the residue of the raft. The defendant, afterwards, caused the raft to be attached, and he, or the sheriff, put a deputy bailiff on the raft. While it was so in the custody of the bailiff, the plaintiff requested, or offered the bailiff to put it in a safe place, as it then lay in a dangerous one in case of a storm. The raft lay about a week, when a storm arose, and about 4,000 feet of the timber was lost. The place to which the plaintiff offered to remove the raft was a secure one; and after the storm the residue of it was removed to that spot. Before the storm, the defendant directed the bailiff not to move the raft; and when the plaintiff requested its removal, the bailiff went to consult the defendant, and on his return, said his orders were not to move it.

The defendant gave in evidence a contract, dated 9th *April*, 1808, by which the plaintiff and *C. Stafford*, of *Plattsburgh*, in *New-York*, engaged to deliver to the defendant and another, in *Quebec*, during the month of *June*, from eight to twelve thousand cubic feet of white oak timber, or as much as their raft might contain, &c. &c., for which they were to be paid one shilling, *Halifax* currency, per cubic foot, on delivery, with any reasonable advance they might require on the arrival of the raft at *St. Johns*; one hundred pounds was to be paid by the party failing to perform. He also gave in evidence authenticated copies of the proceedings in the Court of King's Bench in *Quebec*, to wit, 1. The writ of attachment issued the 15th *June*, 1808, out of the Court of King's Bench, for the district of *Quebec*, directed to the sheriff, commanding him to seize all the goods, chattels and effects of the plaintiff and *Stafford*, &c. and to summon them to appear before the said court, on the 20th *June*. On this writ a return was endorsed by the sheriff, stating that he had, by virtue thereof, seized two hundred and seven pieces of oak timber, belonging to *Jenner* and *Stafford*, and had summoned them, &c.; 2. An affidavit of *Joliffe*, previous to issuing the writ, which stated that *Jenner* and *Stafford* were justly indebted to him one hundred and forty-nine pounds, *Canada* money, for money paid and advanced to them, to enable them to fulfil their said agreement, for *the delivery of the timber, &c.; that they brought two rafts of timber to *Quebec*, which they refused to deliver to him, according to the said contract, and he verily believed that they intended to sell and dispose of the timber, and to secure their effects, and depart from the province, with an intent to defraud him, &c.; 3. The declaration of the cause of action, which was annexed

to the writ of attachment; 4. An account of one hundred and thirty-nine pieces of merchantable and sixty-four pieces of refuse timber, received by *Joliffe*, at the foot of which was a receipt in full, dated the 14th *July*, 1808, by the plaintiff to the defendant, for a balance due the plaintiff, after deducting the moneys advanced to the plaintiff, and a sum on account of the costs and expenses of the attachment. The defendant also produced the deposition of *E. Bowne*, the attorney of *Joliffe*, in *Quebec*, taken under a commission, proving the authenticity of the writ and documents, and the seals and signatures of the officers, &c. and that they were the officers, &c.; that a settlement took place between the parties, in the deponent's office, in *Quebec*, in *July*, 1808, by which the plaintiff agreed to deliver over to the defendant the timber which had been attached, and to perfect the contract before mentioned, and to pay six pounds on account of the costs and disbursements in the suit, which was accordingly done; and the defendant paid the attorney the costs of the suit against *Jenner* and *Stafford*, and directed him to discontinue the suit; which was done accordingly; that the settlement was voluntary on the part of *Jenner*, and advantageous to him, for if the suit had been continued, he would have been obliged to pay the full sum demanded, and all the costs.

E. Chase, a witness for the plaintiff, was offered, and objected to as interested; but being released, was sworn, and testified, that he did not understand that the settlement between the parties had relation to the lost timber; that he heard the plaintiff say to the defendant, after the delivery of the timber that remained after the storm, that he should see him another day and settle it. The witness was first sent to make the settlement, and the settlement contemplated was confined, as he understood, to the timber which remained after the storm; but he was not at the office of the attorney when the settlement was finally made.

The jury found a verdict for the plaintiff, for 1,519 dollars.

A motion was made to set aside the verdict, and for a new trial; 1. Because the timber being in the custody of the law, at the time, no action could be maintained; 2. Because there was a probable cause for suing out the attachment; 3. Because the timber being in the custody of the law, any directions of the defendant to the officer could have had no influence; 4. Because there had been a full settlement of the whole cause of action between the parties; and, 5. Because the damages were excessive, the jury having allowed for the lost timber a much greater sum per foot than the contract price.

Z. R. Shepherd, for the defendant, contended, that as the attachment and proceedings were agreeable to the laws of *Quebec*, and as the timber, after it was attached, was in the custody of the law, *trover* would not lie in such a case.

The count for a malicious prosecution cannot be maintained. There was sufficient evidence of a probable cause of seizure. By the refusal of *Jenner* to deliver the timber, there was a

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Where *A* sued *B*. on a contract for the delivery of goods, and a settlement was made between them, and *B* gave *A*. a receipt in full for the balance due for the goods delivered; this was held to be no bar to a subsequent action by *B*. against *A*. for a *misfeasance*, in regard to goods, part of the subject of the same contract, and not delivered, but lost, as *B*. alleged, by the misconduct of *A*.

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breach of the contract, and *Joliffe* had a good cause of action against him. *Jenner* was bound by his contract to deliver the whole raft at the contract price, though it contained more than 8,000 feet.

The third count for negligence cannot be supported. The property was attached by a sheriff, under legal process, and placed by him in custody of his bailiff, who was the servant of the sheriff, not of the defendant. The bailiff was bound to obey the directions of the sheriff, not those of the defendant. Before any application to the defendant, the bailiff refused to remove the raft. He, no doubt, acted pursuant to the orders of the sheriff; and if there was any negligence on the part of the bailiff, he alone was responsible.

Again, subsequent to all the proceedings, and to the loss of the timber, the parties made a full and complete settlement. In *Brown v. M'Kinally*, (1 *Esp. Cas.* 279,) it was decided that, where a party sued on a claim which he knows to be unfounded, voluntarily pays the money, he cannot recover it back in *assumpsit*, though he declares at the time he pays it, that he pays it without prejudice to his right, and meant to bring an action to recover it back. The present is a stronger case, and the plaintiff must be concluded by the settlement he has voluntarily made.

Again, the measure of damages was the contract price, and the jury have allowed more. The damages are, therefore, excessive. Besides, the plaintiff owned but half of the raft, and was not entitled to recover for the whole loss.

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**Foot*, contra, contended, that it should have been proved that by the law of *Quebec*, the timber could have been attached for a breach of the contract; but admitting that it was regularly attached, and in the custody of the law, he relied on the decision of the court, (6 *Johns. Rep.* 9,) that the defendant was answerable for the negligence of the bailiff, who had the custody of the property.

Per Curiam. The plaintiff's right to recover must depend upon the count for the defendant's negligence and carelessness in keeping the plaintiff's timber under the attachment. The proofs in the case are a complete answer to the counts in *trover*; for it appears that the seizure of the timber was a legal seizure, under a writ of attachment, issued by the highest court of judicature of the province; and it is to be presumed that it was issued conformably to the laws of the province: besides, the settlement which actually took place, is a recognition of the validity of the attachment.

In every case where an officer is intrusted by the common law, or by statute, an action lies against him for a neglect of the duty of his office. (1 *Salk.* 18.) So for every fraud or neglect in the execution of his office. (*Lat.* 187.) If an officer, having authority to attach a man's goods, keep them in an unsafe place, or expose them to destruction, he acts contrary to the duty of his office, and will be liable in case they are destroyed. And where the plaintiff, upon a process of attachment,

causes an officer so to conduct himself, as to misbehave in the execution of his office, and produce the loss or destruction of goods in his custody, the party has his election either to sue the principal or the officer. In applying this principle to the case before us, we are furnished with a very loose statement of facts. On what point the jury passed, it is impossible to say from the case. There is some evidence that the plaintiff requested the raft to be moved to a place of greater security, and that the defendant, by his interference, prevented it. If the defendant meant to set aside the verdict on this ground, we ought to have been furnished with the judge's opinion, and a more detailed statement. Making the necessary intendments in favor of every verdict, we cannot say there was not sufficient evidence to justify the finding. The settlement was for the timber actually delivered. The case of *Brown v. M'Kinally* (1 *Esp. Cas.* 279) does not apply, because the *misfeasance* of the defendant would not have been a subject of inquiry upon any issue to be joined in *that suit. The objection that *Jenner* owned but half of the raft, and was, therefore, entitled to recover for a moiety only of the injury, is not supported by the case. He was in possession of the raft, and is, *prima facie*, to be deemed the owner. As to the excessiveness of the verdict, the contract price is not the criterion, and there are no *data* from which we can calculate that the damages are excessive.

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v.
VAN ALSTYNE.

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Motion denied. (a)

(a) See S. C.
6 *Johns. Rep.* 9.

CRAMER against VAN ALSTYNE.

RIKER, for the plaintiff, moved to amend the *ca. sa.* on file, in this case, by striking out the return day, the 16th *August*, and inserting the 15th *August*, it having been made returnable, by mistake, out of term. He cited 4 *Burr.* 1187. 1 *Cromp. Prac.* 368. 1 *Salk.* 273. 1 *Ld. Raym.* 775, 776, 3 *Wils.* 341. 1 *Johns. Cas.* 31. 5 *Johns. Rep.* 163.

An execution returnable out of term, is not void, but may be amended. *Aliter* as to mesne process. (a)

Van Wyck, contra, contended that the writ was void, and could not be amended. He cited 2 *Johns. Rep.* 190. 4 *Johns. Rep.* 309. 2 *Caines' Rep.* 63. 2 *Salk.* 700.

Per Curiam. The case of *Campbell v. Cumming* (2 *Burr.* 1187) is in point. Where an *execution* is returnable out of term, it is not *void*, though liable to be set aside, on motion, for irregularity. It may, therefore, be amended, though it would be otherwise as to *mesne process*. We grant the rule to amend, on payment of costs.

Motion granted.

(a) A *capias ad respondendum* returnable out of term is void, and not amendable. *Miller v. Gregory*, 4 *Cowen*, 504. Mesne process against the body *tested* out of term cannot be amended. *Chandler v. Brecknell*, 4 *Cowen*, 49. *Aliter* of a *ca. sa.* *Jones v. Cook*, 1 *Cowen*, 309. An amendment will be permitted in the return day of an execution. *Vandusen v. Brower*, 6 *Cowen*, 50.

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v.
PAYNE.

A daughter, of the age of 19 years, with the consent of her father, went to live with her uncle, for whom she worked when she pleased, and he agreed to pay her for her work; but there was no agreement for her continuance in his house for any time. While in her uncle's house, she was seduced and got with child, and immediately afterwards returned to her father's house, where she was maintained, and the expense of her lying in paid by him; though had not the misfortune happened to her, she had no intention of returning to her father; it was held that an action on the case for debauching and getting his daughter and

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servant with child, *per quod servitium amisit*, was maintainable by the father against her seducer; the father not having divested himself of his power to reclaim the services of his daughter; and the supposed relation of master and servant was presumed from his right to her services, arising from his

*MARTIN *against* PAYNE. (a)

THIS was an action of trespass on the case, for debauching and getting with child *Lanah*, the daughter and servant of the plaintiff, by which he lost her service, and was obliged to expend a large sum of money for the expenses of her lying in, &c.

The cause was tried at the *Washington* circuit, in *June*, 1811, before Mr. Justice *Spencer*. At the trial the daughter of the plaintiff was produced as a witness, and proved the seduction, and pregnancy, &c. that at the time of the seduction, which was in the spring of the year 1810, she was nineteen years of age, and lived in the house of her uncle, with whom she had resided from the autumn of 1809. She worked for her uncle when she pleased, and was to receive from him, for her work, one shilling per day. She also worked for herself, and expended all her earnings, in clothes and necessaries for herself, as she saw fit. There was no agreement for her continuance in her uncle's house for any particular time; but she went to reside with him, on the terms above-mentioned, with the consent of her father. The defendant paid his addresses to her, while she was at her uncle's, and she expected to have married him; and had, at that time, no expectation of returning to her father's house to reside. During the period of her residence with her uncle, she occasionally visited her father's house, remaining there a week at a time. Immediately after she was debauched, she returned to her father, who supported her, and was at the expense of her lying in, &c. It did not appear that the father had done any act dispensing with his daughter's service, other than consenting to her remaining with her aunt.

The defendant's counsel objected, that the plaintiff was not entitled to recover; but the judge, without deciding the question, permitted the cause to go to the jury, who found a verdict for the plaintiff subject to the opinion of the court, on the facts in the case, as above stated.

**Skinner*, for the plaintiff. If, at the time of her seduction, the daughter can be considered as in the service of her father, the action is maintainable. The only evidence to the contrary is the declaration of the daughter that she did not expect to return to her father's house to reside; but this must be taken in connection with her previous language, that she was courted by the defendant, and expected to be married to him. The fair inference from the whole testimony is, that she grounded her expectation of not returning again to live with her father, on the belief that she was soon to be married to the defendant. It cannot, therefore, be said that here was, in truth, no *animus revertendi*. This case is clearly distinguishable from that of *Dean v. Peel*, (5 *East*, 45,) which will, no doubt, be relied

(a) This cause was decided in last *August term*, but accident prevented its insertion in its proper place.

upon by the defendant's counsel. Here the daughter went to live with her uncle, by consent of her father, under a contract with the uncle to pay her for her services. The father was bound to maintain her, and permitted her to go out to earn wages. In case her uncle had refused to pay her, the father only could have maintained an action against the uncle to recover the wages. She must, therefore, in presumption of law, be considered as in the service of her father. He is responsible for her maintenance while she is under age, and is, therefore, entitled to her services and earnings. (1 Bl. Com. 446.)

The case of *Dean v. Peel* is a recent decision of the English court of K. B. and is opposed to the principle of prior adjudications. It has no binding authority on this court.

Henry, contra. This is an action for a *loss of service*. A father cannot maintain an action against another for debauching his daughter and getting her with child. (2 Ld. Raym. 1032. 6 Mod. 127. S. C.) He can only maintain an action of trespass *quare clausum fregit* for entering his house, and assaulting and getting his daughter with child, *per quod servitium amisit*. The only ground on which the action is sustainable is a loss of *service*; the rest is matter of aggravation. (3 Burr. 1878. *Postlethwaite v. Parks*.)

The plaintiff must make out an actual and subsisting relationship of *master* and *servant*. There must be an actual *service*, and under the paternal roof. If at the time of the seduction, the daughter is not in the actual service of her father, he cannot maintain this action. The case of *Dean v. Peel* is in point. That case is not new law; it recognises only principles before settled. The facts of this case are stronger against maintaining the action.

*The mere circumstance that the father is legally entitled to the wages earned by his child, will not give him a right to this action. The right of the father to those services is founded on the fact of his protecting and maintaining his child. He is entitled to this action, because he is the protector and guardian of the morals and virtue of his child; but if he suffers her to depart from his house, or withdraws his protection, he has no right to an action. If the daughter remains under his roof and protection, he may maintain an action for entering his house, and debauching her, *per quod servitium amisit*, though the daughter is an adult; but some acts of service, however slight, must be proved, though there need not be a contract of service. (2 Term Rep. 166.)

J. Russel, in reply, insisted, that if the relationship of master and servant existed, either at the time of the seduction, or at the time of the alleged loss of service, the action was maintainable; for the daughter being under age, and having returned to the house of her father, while pregnant, and there lain in, an actual loss of service had accrued. A service, *de facto*, is not necessary to be shown. It is enough that the father is entitled to the services of his daughter, while under age, and has

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liability to
maintain and
provide for her
while under
age.(a)

(a) Acc.
Clark v. Fitch,
2 Wendell, 459.
So where a
daughter was
an indented ap-
prentice at the
time of her se-
duction, but
whose inden-
tures were can-
celled before
her lying in,

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which took
place at the
house of her
mother, it was
held that the
action was sus-
tainable by the
mother. *Sar-
geant v. Deni-
son*, 5 Cowen,
116. But if the
daughter is
above the age
of twenty-one
years, the fa-
ther cannot
maintain the
action unless
she is actually
in his service
so as to consti-
tute the relation
of master and
servant. *Nich-
olson v. Stry-
ker*, 10 Johns.
Rep. 115. *Mil-
lar v. Thomp-
son*, 1 Wendell,
447.

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a right to control her conduct. Her secret determination to marry, and not return to her father's house, cannot change the relationship, nor affect his rights. The principle of the decision in *Dean v. Peel*, that the daughter had expressed an intention not to return to her father's house, is not founded in reason; and the case of *Postlethwaite v. Parks* merely decides that this action is not maintainable where the daughter is of full age, and resides abroad out of her father's house.

SPENCER, J. delivered the opinion of the court. The case of *Dean v. Peel* (5 East, 49) is against the action. It was there held that the daughter being in the service of another, and having no *animus revertendi*, the relationship of master and servant did not exist. In the present case, the father had made no contract hiring out his daughter, and the relation of master and servant did exist, from the legal control he had over her services; and although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. That is the only case which has ever denied the right of the father to maintain an action for debauching his daughter whilst under age; and I consider it as a departure from all former decisions on this *subject. It has frequently been decided, that where the daughter was more than twenty-one years of age there must exist some kind of service; but the slightest acts have been held to constitute the relation of master and servant, in such a case. In *Bennet v. Alcott*, (2 Term Rep. 166,) the daughter was thirty years of age, and *Buller*, Justice, held that even milking cows was sufficient. But where the daughter was over twenty-one, and in the service of another, as in *Postlethwaite v. Parks*, (3 Burr. 1878,) the action is not maintainable. In *Johnson v. M'Adam*, cited by *Topping* in *Dean v. Peel*, *Wilson*, J. said that where the daughter was under age he believed the action was maintainable, though she was not part of the father's family when she was seduced, but when she was of age, and no part of the father's family, he thought the action not maintainable. In *Fores v. Wilson*, (*Peake's N. P. Cas.* 55,) which was an action for assaulting the maid of the plaintiff, and debauching her, *per quod*, &c. Lord *Kenyon* held that there must subsist some relation of master and servant, yet a very slight relation was sufficient, as it had been determined that when daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the *supposed* relation of master and servant, though every one must know that such a child cannot be treated as a menial servant.

Put the case of a gentleman's daughter at a boarding-school, debauched and gotten with child, on what principle can the father maintain the action, but on the *supposed* relation of master and servant, arising from the power possessed by the father to require menial services; for in such a case, there is no actual existing service constituting the relation of master and servant. Would it not be monstrous to contend that, for such an injury, the law afforded no redress? The case sup-

posed is perfectly analogous to the one before us: here the father merely permitted his daughter to remain with her aunt; he had not divested himself of his power to reclaim her services, nor of his liability to maintain and provide for her. She was his servant *de jure* though not *de facto*, at the time of the injury, and being his servant *de jure*, the defendant has done an act which has deprived the father of his daughter's services, and which he might have exacted but for that injury. We are of opinion that the action is maintainable under the circumstances of this case, and, therefore, deny the motion for a new trial.

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v.
STILES.

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Motion denied. (a)

(a) See Christian's observation on this kind of action, 3 Bl. Com. 142, note (13). Schwyn's N. P. 966. 970. Peake's N. P. Cas. 55. 233. 2 Term Rep. 4. 5 Bos. & Pull. 476. 2 Caines' Rep. 219. 3 Wilk. 18. 3 Esp. Cas. 119. 1 Johns. Rep. 297.

JACKSON, *ex dem.* THOMPSON, against STILES.

FISK, for the defendant, moved to vacate a rule obtained in *May* term, for leave to issue a *habere facias possessionem* in this cause, and also to set aside the writ of *habere facias possessionem*, which was tested the 16th *May* last, with costs.

In *August*, 1810, the declaration and notice in ejectment was duly served on *Isaac Bell*, the tenant in possession, and in *November* term following, a judgment by default was recovered against the casual ejector, which was signed the 26th *November*, and soon after, a *habere facias possessionem* was issued to the sheriff of *Orange*, returnable in *February* term, 1811. The sheriff delivered the possession of the premises, in the absence of the tenant and his family, to the lessor.

In *February* last, the wife of *Bell* and her family retook possession of the premises, without the consent of the lessor. The lessor, in *March* last, commenced proceedings under the act for a forcible entry and detainer, but nothing was done by the sheriff or jury. In *May* last, the lessor obtained a rule of the court, granting leave to issue another *hab. fac. poss.* which was accordingly issued, and the sheriff, on the 20th *May*, by virtue of the writ, turned the wife and family of *Bell* out of the premises, and put the lessor into possession. It appeared that *Bell*, in *September*, 1810, had been sentenced to the state prison for eight years; but his wife and family had continued on the premises until turned out by the sheriff, and that she and her family returned the next day to the house.

It appeared that the first writ of *hab. fac. poss.* had never been returned.

An exemplification of the record was produced, on which no entries appeared to have been made after the judgment and award of the first writ.

J. Duer, for the plaintiff.

Per Curiam. The first writ of possession has never been

A writ of *habere facias possessionem* was issued on a judgment in ejectment, returnable in *February*, 1811, which was executed, but never returned.

In *May*, 1812, the plaintiff issued another *hab. fac. poss.* on the same judgment, the tenant having, in the mean time, retaken possession of the premises.

It was held, that though a year and a day had intervened between the term at which the first writ was returnable and the issuing of the second writ, no *scire facias* was requisite to revive the judgment, as the court would presume that the first execution was continued down on the roll to

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the time of issuing the second execution, which may be done at any

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time, being
matter only of
technical form.
(a)

returned, and though a year and a day has intervened between the term at which the first writ was returnable and the issuing of the second, a *scire facies* was not requisite to revive the judgment. The first execution may have been continued down on the roll, to the time of issuing the second execution. As this may be done at any time, and is a thing merely of technical form, we will presume it to have been done in this case. Nothing appears to contradict this presumption, and the facts stated show that the party has never had the full fruit of his judgment, and justice and equity require that he should have it. Motion denied.

(a) Vide *Mayor of Albany v. Evertsen*, 1 Cowen, 36. But a second *scire facies* cannot issue until the return of the first. *Campden v. Field*, 3 Wendell, 392. One execution being issued and returned, a second may go more than a year after without a *sci. fa.* *Thorp v. Fowler*, 5 Cowen, 446. And where an execution is delayed for more than a year and a day by the consent of the defendant, the plaintiff may have execution without a previous *sci. fa.* *United States v. Hanford*, 19 Johns. Rep. 173.

MECHANICS' BANK *against* HAZARD, BAIL OF HAZARD.

Where a defendant, after verdict, obtained leave to plead his discharge under the insolvent act, *puis darrein continuance* on payment of costs, but neglected to comply with the condition of the rule, and judgment was perfected against him, it was held that he could not, afterwards, avail himself of his discharge; and the court would not, therefore, on motion of his bail, order an

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exoneretur on the bail-piece.
(a)

If the debt in the suit against the principal has been paid, that is matter to be pleaded by the bail, and not ground for their relief, on motion.

HOFFMAN, for the defendant, moved for leave to enter an *exoneretur* on the bail-piece, in this cause, on two grounds:

1. That the principal had been discharged under the insolvent act.

2. That the plaintiff had been paid and satisfied by an endorser of the same note, on which the suit was brought against the principal.

It appeared that the principal was the maker of a promissory note, payable to one *Patten*, and by him endorsed to one *Miller*, who endorsed the same to the plaintiffs, and that in the suit against the principal, as maker, an inquest was taken by default, at the last *November* sittings in *New-York*. After the commencement of the *sittings*, and previous to taking the inquest, the principal was discharged under the insolvent act.

An application was made by the principal, at the last *January* term, for leave to plead his discharge, *puis darrein continuance*, which was granted, on payment of the costs of the sitting, and of the motion. The costs were duly taxed, and the payment demanded *of the attorney of the defendants and refused. Judgment was thereupon perfected in the suit against the principal, the 29th *April* last. *Miller* and *Patten* having been separately sued as endorsers on the same note, *Miller* paid the debt to the plaintiffs; and *Patten* afterwards repaid the amount to *Miller*, and the costs of the suit against him. *Patten* also paid the costs of the suit against the principal, and the costs of the motion made by him for leave to plead his discharge; and the judgment was held, by an agreement with the attorney of the plaintiffs, for the benefit of *Patten*, though there was no regular assignment of the judgment to him. *Miller* was present when it was agreed that the judgment should be kept on foot by the plaintiffs, for the benefit of *Patten*, and he expressed no dissent to the arrangement.

(a) *Acc. Post v. Riley*, 19 Johns. Rep. 54. *Campbell v. Palmer*, 6 Cowen, 596. But see *Franklin v. Thurber*, 1 Cowen, 427. See also *Palmer v. Hutchins*, 1 Cowen, 42. *Mellett v. Van Buren*, Id. 44, note (b.) *Baker v. Taylor*, Id. 165.

The *capias ad respondendum* against the present defendant was returnable on the first day of last *August* term.

Hoffman contended, that the principle settled by the *English* practice, and which had been recognised by this court, (*Seaman v. Drake*, 1 *Caines' Rep.* 9. *Olcott v. Lilly*, 4 *Johns. Rep.* 407,) was, that if the bail were at any time entitled to have an *exoneretur* entered on the bail-piece, such right continued while the suit was pending against them, though eight days after the return of the *capias* had expired before they made application for relief. If application had been made at the last *January* term, for the relief of the bail, on the ground of the principal's discharge, under the insolvent act, the relief would have been granted of course; and the only penalty the bail had now incurred, by the delay, was being subject to the payment of costs.

The debt having been satisfied by one of the parties to the note, it must enure to the benefit of the others. Here was no regular assignment of the judgment, which distinguishes it from the case of *Clason v. The Assignees of Sands*, decided at the last session of the Court of Errors. This, also, is an application in behalf of bail, towards whom the court are always indulgent.

T. A. Emmet, (Attorney-General,) contra. The principle on which the court order an *exoneretur* on the bail-piece, where the principal has been discharged under the insolvent act, is, that it would be useless to have a formal surrender made, since the principal would be immediately entitled to a discharge. But that is not the present case, as the principal could not avail himself of the benefit of his discharge, under the insolvent act, on account of his *own *laches*, in neglecting to comply with the order of the court, giving him leave to plead his discharge.

A formal assignment of the judgment was unnecessary; and if it was requisite, a court of equity could compel its execution.

Per Curiam. The *laches* of the principal in this case precludes him from availing himself of his discharge, in the suit against him. The reason, therefore, of ordering an *exoneretur* on the bail-piece, on the ground of the principal's being discharged under the insolvent act, which is merely to prevent unnecessary circuitry, does not apply in this case. If the bail neglect to apply in season for relief, it is at their peril. If the debt in the suit against the principal has been satisfied, that is matter which the bail must plead. The motion must be denied.

Motion denied.

NEW-YORK,
October, 1812.

MECHANICS'
BANK
V.
HAZARD.

the suit against
the principal
has been paid,
that is matter
to be pleaded
by the bail, and
not ground for
their relief, on
motion

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END OF OCTOBER TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

Court for the Trial of Impeachments

AND

THE CORRECTION OF ERRORS

OF THE

STATE OF NEW-YORK,

IN APRIL, 1811, AND IN 1812.

JOHN V. N. YATES, *Plaintiff in error,*
against
 JOHN LANSING, JUN. *Defendant in error.*

Where the
 chancellor com-
 mitted one of
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(a) 2 R. S.
 571. sec. 60.
 two officers of
 the Court of
 Chancery, for
 malpractice
 and contempt,
 and a judge of
 the Supreme
 Court, in vaca-
 tion, on a *habeas corpus*, dis-
 charged the
 prisoner, and
 the chancellor
 afterwards re-
 committed him
 for the same
 cause; it was
 held that the
 chancellor was
 not liable to an
 action, at the
 suit of the offi-
 cer, for the pen-
 alty given by
 the fifth section
 of the *habeas corpus*
 act.
 (Sess. 24. c. 65.
 [2 R. S. 571. s.
 59, 60.])

A judge of a
 court of record

THIS cause came before the court, on a writ of error from the Supreme Court. The plaintiff brought an action of debt, in the court below, to recover the penalty of 1,250 dollars, under the fifth section of the *habeas corpus* act. (a) The defendant pleaded specially, and there was a demurrer to the plea, on which the court below gave judgment for the defendant. See 5 *Johns. Rep.* p. 282—299.

The counsel declined arguing the demurrer in the court below. The following is a brief statement of the arguments in the Court of Errors :

Rodman and *Van Buren*, for the plaintiff in error. The defendant having been discharged, by Mr. Justice *Spencer*, under the *habeas corpus* act, was again re-committed for the same offence, by the defendant, knowing of such discharge. These facts, admitted by the pleadings, *prima facie*, are sufficient to entitle the plaintiff to recover. It is, then, incumbent on the defendant, in order to exonerate himself from the penalty, either to bring his case within some of the *exceptions* of the statute, or to make out a defence arising *aliunde*. The act declares, that the person set at large by *habeas corpus*, shall not be again imprisoned for the same offence, “ unless, 1. By the legal order or process of the court, wherein he is bound by recognisance to appear ; or, 2. By other court having jurisdiction of the cause.” The defendant does not pretend to avail himself of the first exception ; and, as to the *second*, this court, in the case of *The People v. Yates*, (a) at the last

(a) 6 *Johns. Rep.* 337. 512.

session, decided, that by the words "other court having jurisdiction of the cause," was meant the court in which the defendant was bound, by recognisance, to appear, or some court having general criminal jurisdiction; as the Courts of *Oyer and Terminer* and *General Sessions of the Peace*.

The next ground of defence is, that admitting the defendant was mistaken, he acted judicially, as a court of chancery. This presents the most material question for discussion in this cause; for the other points have been already settled by this court, in the case of *The People v. Yates*. The unlimited irresponsibility of the Court of Chancery cannot be maintained by any authority; and we presume will not be asserted in this case.

It would be a most dangerous principle; and would subvert the whole system of our jurisprudence. The power of a judge must be limited. And the principle we shall contend for is this; *that a judge is not responsible, so long as he acts within his jurisdiction. In the cases cited by the *Chief Justice*, in delivering the opinion of the court below, from the *Year Books*, and *Staunford*, &c. the justices clearly acted within their jurisdiction.

So in *Hammond v. Howell*, (2 Mod. 218,) and the other cases, the court acted within their jurisdiction; but committed an error of judgment, for which they were not considered as responsible. The case of *Floyd and Barker* (12 Co. 23) was in the Court of Star Chamber, which was, afterwards, abolished for its arbitrary assumption of jurisdiction. In *Miller v. Searl and others*, (2 W. Bl. 1141—1145,) the point decided by the court was, that the commissioners of bankrupts had exceeded their authority; and were, therefore, liable to an action for false imprisonment. The position of Lord Chief Justice *De Grey*, that the protection afforded to superior courts is absolute and universal, is a *dictum* only, and the cases he cites in support of it, were those in which the judges had jurisdiction. A man who judges of a matter, on which he has no authority to decide, is not to be considered as a judge, but as a private individual. Indeed, the Supreme Court, in this case, and the *Chancellor* himself, in the *printed case*, which has been produced to this court, put it on the ground, that the subject was within the jurisdiction of his court, and that he had a right to decide on contempts. In *Creps v. Durden*, (Cowp. 640. 645,) Lord *Mansfield* considered it to be an agreed point, that where a justice exceeded his jurisdiction, he was liable to an action. The same distinction is laid down by Lord *Coke*, in the case of the *Marshalsea*; (10 Co. 70—76;) that when a court has jurisdiction of a cause, and proceeds, *inverso ordine*, or erroneously, there the party who sues, or the officer who executes the process, is not liable; but when the court has no jurisdiction of the cause, the whole proceeding is *coram non judice*, and an action will lie. As if the Court of Common Pleas, in *England*, should undertake to decide criminal cases, or pleas of the crown, the proceedings would be *coram non judice*, and the judges liable as individuals. Had, then, the defendant jurisdic-

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is not liable to answer personally, in a civil suit, for any act done by him in his judicial capacity, nor for errors of judgment. (a)

Where a master in chancery was committed by order

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of the Court of Chancery, and the order stated that A. B. while he was master, filed a bill to which he subscribed the name of C. D. one of the solicitors of the court, without his knowledge or consent, &c. "contrary to the statute in such case made and provided, in wilful violation of his duty as master, and in contempt of the court, and the said A. B. was ordered to be committed to gaol until the further order of the court;" it was held to be a legal commitment for a contempt; the words "contrary to the statute," &c. being surplusage; and that a judge of the Supreme Court could not, on *habeas corpus*, discharge the person so committed from his imprisonment. [Vide 2 R. S. 278, s. 10, 11. Id. 283, s. 43.]

The Court of Chancery may, in its discretion,

(a) Vide *Acc. Cunningham v. Bucklin*, 8 Cowen, 178.

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commit for a
contempt, on
the affidavit of
witnesses only,
without first
putting the par-
ty to answer on
interrogatories.A commitment
for a contempt
for an indefinite
time, or "until
the further or-
der of the
court," is good.
[Vide 2 R. S.
278, s. 11.]Whether a
judge of the
Supreme
Court, in vaca-
tion, has any
power, under
the *habeas cor-
pus* act, other
than to bail
persons com-
mitted for trial,
or to keep the
peace and an-
swer indict-
ments? *dubita-
tur*. He has
no power to
discharge a
person, com-
mitted by order
of the Court of
Chancery, on
a conviction
for a contempt
of that court.
[2 R. S. 567, s.
40. (3) *Id.* 1,
39.]And where a
judge in vaca-
tion, on *habeas
corpus*, dis-
charged a per-
son committed
by the chancel-
lor on a con-
viction for a
contempt, and
he was again
recommitted
for the same
cause, such
recommitment
was held legal.A person who
has been regu-
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tion in this case? This question has been settled in the negative by this court, in the case of *The People v. Yates*. (6 *Johns. Rep.* 498, 499. 502—504. 510. 512.) That decision must be final and conclusive. It is now the fixed and unalterable law of the land.

Admitting that the remedy by an action at common law is doubtful; there can be no doubt since the statute has given the *penalty to the party aggrieved. It is given against any person who shall commit, or *cause* to be committed, &c. It is not merely the ministerial officer who arrests, and commits, but the court ordering the commitment, is also made liable. The persons liable are not particularly named; but that was unnecessary, as the words are as general and comprehensive as could be used. And this construction is confirmed by the concluding words: "Any colorable pretence or variation in the warrant of commitment notwithstanding." Indeed, if such is not the true construction of the act, then this boasted palladium of the rights of the citizen is a dead letter. It may be said that the judge may be impeached; but impeachment brings no recompense to the injured individual.

Henry and Van Vechten, contra. It has been very justly observed that this cause is very important as regards the jurisprudence of the state. It involves the question as to the powers of courts to commit for contempts, and as to the jurisdiction of the Court of Chancery. It is to be regretted that the counsel for the plaintiff should consider these points as already adjudged by this court. We deem it our duty, however, with great respect, to examine them. It is not denied that the decisions of this court are immutable, as it regards inferior courts. But unless this court assumes to itself the attributes of perfection and infallibility, it will not consider itself bound by its own opinions, if, on further examination, they should be thought erroneous.

The greatest and most illustrious judges in *England* have changed their opinions, and thereby changed the law. But we claim a right to examine these points; for a party is entitled to be heard before he is judged, and the defendant has not been heard on them.

A court of justice has a right to commit for a contempt, not only of its power, but against its purity. It has been said that a violence, or contempt, in the face of the court, may be punished; because the crime is merged in the atrocity of the contempt; (4 *Johns. Rep.* 328;) but not acts done out of court, in contempt of the court. Contempts are either *direct*, or consequential. (4 *Bl. Com.* 284—288.) Any corrupt practices in the subordinate officers of a court are contempts. Attorneys, solicitors, sheriffs, bailiffs, parties, witnesses, jurors, &c. are all subject to the animadversion of courts, for contempts. (*Bac. Abr. Attachment*, (A.) 1 *Com. Dig.* 193. *Attachment*, (A.) There are various classes of constructive contempts, founded on the criminal conduct of the officers of courts, and involving also a criminality *for which they are

indictable. The power of a court to punish the offender in such cases is essential to the due administration of justice. The various contempts are stated by *Hawkins*. (*Hawk. Attachment*, b. 2. c. 22. s. 2, 3, 4, 5, 6. 9, 10, 11.) And contempts which do not strike directly at the power of the court, and which are indictable offences, may be proceeded against summarily by attachment; as in case of *extortion* of an officer, forging a writ, &c. Signing a counsellor's name to a bill in equity, without his consent, has been punished as a contempt. (*Thistlethwaite's Case*, 1 *Com. Dig.* 594.) *Deceit* is an offence punishable by statute, by fine and imprisonment; (*Laws*, v. 1. p. 221;) yet an attorney who is guilty of *deceit*, may be proceeded against by attachment for a contempt of court.

This law as to the powers of courts to punish for contempts, is the settled law of *England*, (4 *Bl. Com.* 286,) grounded upon immemorial usage, and recognised and confirmed by *magna charta*. By the thirty-fifth article of our constitution, it is also the common law of this state; for no statute has ever been passed to abrogate this law. Indeed, it seems to be admitted, that courts have this power, and it is not denied that the Court of Chancery possesses it equally with the courts of common law.

If the conduct of the plaintiff amounted to a contempt, it was the duty of the chancellor to punish it, and protect the suitors in that court from the oppression of its officers. That the act of which the plaintiff was guilty was in violation of a statute, was an aggravation of the offence, but the suitor was not to be told to seek his remedy by indictment. Admitting it to have been an offence against the statute, the *contempt* was not *merged* in the crime. If that were the case, then *extortion*, *bribery* and *libels* on courts, could not be punished as contempts. Will the power of either branch of the legislature to commit for a contempt be questioned? Whence is that power derived? Not from the constitution, but from the common law, the source from whence courts of justice derive their power.

The chancellor did not punish the plaintiff for a crime, but merely for a *contempt*. He describes the offence, it is true, as a crime, to show its aggravated nature; but though the offence may be double, there has been but one punishment by the chancellor, that for a *contempt*. How, then, has he assumed a criminal jurisdiction? A court is not to be presumed to act beyond its jurisdiction. That must be clearly and satisfactorily shown. But there is no evidence of it in this case; or that the plaintiff has been injured by the commitment for a contempt. Suppose a person should cut off the ear of a suitor in court; and the court, in its order of commitment for the contempt, should add that it was also against the statute; would this description be an assumption of criminal jurisdiction? The order of commitment, in this case, if fairly read, does not assume any such jurisdiction. Strictly speaking, the conduct of the plaintiff was not an offence against the statute;

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larly committed by the chancellor for a contempt, and afterwards is improperly set at large, may be recommitted by an order of the Court of Chancery, reciting the original writ or attachment.

It seems, that the Supreme Court cannot discharge, on *habeas corpus*, a person committed by the Court of Chancery, for a contempt of that court. (a)

(a) The Supreme Court of the U. States will not grant a *habeas corpus* where a party has been committed for a contempt, by a court of competent jurisdiction; and if

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granted, the court will not inquire into the sufficiency of the cause of commitment.

Ex parte Kearney, 7 *Wheat* 38.

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for, though a master is prohibited from acting as a solicitor, (*Laws*, vol. 1, p. 221, *sess.* 24, *c.* 32, *s.* 9,) yet he cannot be said to act as a solicitor, when the proceedings are carried on in the name of another person who is a solicitor. If he was, in fact, a solicitor of the court, while he held the office of master, his right to act as solicitor was suspended. But though not an offence within the words, it is within the spirit of the act; and such an attempt to evade its provisions, was an aggravation of the contempt.

If, then, according to the fair construction of the order of commitment, the plaintiff was imprisoned for a contempt; the judge had no authority, under the *habeas corpus* act, to discharge him.

Our *habeas corpus* act is a copy of the *English* statute, and though, in the last revision of the laws, the *preamble* has been omitted, yet it is, notwithstanding some slight verbal alteration, to receive the same construction. A judge, at *common law*, has no power to allow a *habeas corpus*. The writ issued in this case was marked "by the statute;" we must, therefore, look to the statute for the power of the judge. The *habeas corpus* act "extends only to the case of commitments for such criminal charges as can produce no inconvenience to public justice by a temporary enlargement of the prisoner; all other cases of unjust imprisonment being left to the *habeas corpus* at common law." (3 *Bl. Com.* 137, 138. 10 *Mod.* 429.) Its object is to relieve persons from imprisonment in *bailable* cases. The act (*Sess.* 24, *c.* 65, *s.* 3) says that "any person," "other than persons convict, or in execution by legal process, or committed for treason or felony, plainly and specially expressed in the warrant of commitment," may apply, &c. No other person can apply to a judge in vacation for a writ of *habeas corpus*. And if he cannot apply, the writ cannot be allowed.

Again, as to the manner in which this power is to be exercised. The judge is to discharge the prisoner, on taking his recognisance to appear at the next court at which the offence is properly recognisable. This clearly shows that the judge is authorized to discharge only, where the prisoner is to be *tried* for a *bailable* offence. The object of the act is to relieve the person from prison *until he is *tried*. Again, the judge is to take sureties according to the *quality* of the prisoner, and the nature of the *offence*. It follows that a judge has not power to discharge, except for a *bailable* offence. Can he discharge where the prisoner, on the face of the commitment, is in prison, for an offence not *bailable* or to be *tried*? He cannot, by the express exception of the statute, where the person is convicted, or in execution: nor can he discharge in a case of treason or felony. But the Supreme Court may discharge in such cases. The power of the judge in vacation is not, therefore, co-ordinate with that of the Supreme Court, but is limited and subordinate. He cannot enforce obedience to the writ, or compel its return. The judge, in the present case,

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admitted the fact that this was a commitment for a contempt; for, in assigning the reasons for the discharge, he declared the commitment illegal. He does not say that the party was not convict, or not in prison, on conviction for a contempt. We contend that he had no power to pronounce the commitment illegal. The Court of *King's Bench*, in *England*, would not bail in such a case. (*Hawk. b. 2, c. 16.*)

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Suppose a person in prison on execution for a debt brought before a judge in vacation, will it be said that he can discharge him on *habeas corpus*? But if he cannot in such a case, nor in treason or felony, whence does he derive his authority to discharge a person committed for a contempt? It has been said that our statute gives the judge cognisance of the case of every person imprisoned, whereas the *English* statute confines it only to persons imprisoned for crimes. But there is no ground for the distinction. The whole language of our act shows it was intended to be precisely the same as the *English* statute from which it was copied.

The form of the warrant in this case was no ground for the discharge. It was according to established usage. It is not necessary that it should be definite or limited as to time. "Until discharged by due course of law," are words equally indefinite, and yet they have always been held sufficient. (*Hawk. b. 2, c. 16, s. 18.*) Suppose a bill of discovery, and the defendant refuses to answer, and the chancellor commits him for a contempt, must the commitment express a limited time. If so, the complainant may lose his right, by the contumacy of the defendant. It is said, it should be "until a compliance." But who is to judge of the compliance? The chancellor. Then, where is the difference?

Again, it is said the conviction was illegal because no interrogatories were administered. But interrogatories are not indispensably *necessary. An examination on interrogatories is matter of *grace*, not of right. (4 *Bl. Com.* 288. *Doug.* 576.) And Mr. Yates waived all objection to the proceeding against him; for, after notice, he refused to appear. It is a conviction, on default, after notice, which is the same as a confession of the truth of the charge.

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Again, it is said there could not be a commitment by an order; but it should be by a writ or warrant under seal. Every court may prescribe the forms of its own process; and an *order may* be as proper and as efficacious as a writ. (2 *H. P. C.* 122.) Being a commitment by a court of record, an order was sufficient.

The discharge by Mr. Justice *Spencer* was a nullity; it was no discharge under the act, any more than if granted by the gaoler. The chancellor, then, had a right to recommit. The *fifth* section of the act excepts from the penalty when the recommitment is by a court having jurisdiction. The penalty applies to persons. It cannot apply to a court recommitting a party who has been illegally discharged.

The discharge was from the imprisonment, not from the

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conviction, which remained of record. And the order of commitment expressed that it was to be until he paid the money which he had illegally exacted.

The chancellor clearly had jurisdiction, and the order was a species of civil execution. (4 Bl. Com. 284, 285.) If discharged for the informality of the order, or without any reason, still the chancellor had a right to recommit, for the non-payment of the money. It is incongruous to suppose that a judge in vacation can act in case of a conviction for a contempt; for the *habeas corpus* does not bring up the conviction, nor can the judge have it before him, for he has no supervisory power. If a contrary doctrine should be admitted, then a judge of the Supreme Court, in vacation, might discharge a person committed by order of *that court*, for a contempt; nay, a *commissioner* would have the same power.

The judge has no power to discharge a person *convict* from prison; and no penalty can be incurred from recommitting a convict. There was no need of a *trial*. The judgment was already pronounced, and the party in execution. The discharge by the judge could not discharge the *offence*.

If the discharge by the judge was illegal, it was the duty of the chancellor to recommit. There was a judicial exercise of discretion and judgment. The plea states that the defendant acted as a court. Is it just or reasonable that a court should be subject to *this penalty for the honest exercise of its judgment? The statute did not intend to punish an error of judgment as a crime.

Again, the penalty is against a *person*, not a court. Suppose the Supreme Court should commit a person convicted of an offence, and the *chancellor* on *habeas corpus* should discharge him, and that court should re-commit the party; who is to be liable to the penalty? Would each of the judges be liable? If one or two dissented from the opinion of the rest of the court, would they also be liable? Is the penalty to be divided among the judges, and how is it to be levied? In the present case, the proceeding of the chancellor has been sanctioned by three of the judges of the Supreme Court. They affirmed his decision and remanded the prisoner. If the chancellor is liable to the penalty, those judges are equally liable. But the statute never was intended to apply to such a case, or to punish an error of judgment. The *habeas corpus* act was intended to relieve persons committed for *trial*, and to guard against the abuse of the power of the crown and its ministers in *England*. The penalty was to prevent any delay in the *allowance* of writs of *habeas corpus*, as to which no discretion was to be exercised. The evil which was to be remedied, was the delay in bringing persons committed to prison to trial. (*Hawk. b. 2. c. 14. s. 24.*)

Again, we say that the judges of the superior courts are not answerable, personally, for their judicial acts. There is a distinction between an excess of jurisdiction, and having no jurisdiction at all. A judge is to be excused in an error of judg-

ment, as to the extent of his jurisdiction. If any fault has been committed, in the present case, it is in committing for a constructive contempt. Is the defendant to be made answerable for this? If he is liable to the penalty in this case, he is equally responsible for every decree of his court which is reversed. Who would dare to take upon himself the office of a judge, if, for a mistake in the honest exercise of his judgment, his peace is to be disturbed by vexatious suits, his property wasted, and his dignity trampled in the dust? Are the judges of the courts of *common pleas*, many of whom are not lawyers, to be answerable for errors of judgment? Certainly not. Judges are responsible only for a wilful and corrupt violation of duty; and that in the mode pointed out by the constitution. They may be impeached and degraded from office.

Again, this is an action for a penalty. Penal statutes are to be construed strictly. If there is any doubt, the construction ought to be favorable; and is there not room for doubt, when the majority of the Supreme Court, men of the highest judicial talents, have, by their decision, sanctioned the decision of the chancellor? Is a statute to be liberally construed to work a forfeiture? Must we resort to a subtle and refined construction, to minute verbal criticism, in order to spell out an offence? Will not this high court, in such a case as this, rather adopt a benign and liberal construction? Again, it is to be observed, that the statute provides, in case of actions brought against a justice of peace, mayor, recorder, alderman, sheriff, &c. for any thing done, by virtue of their office, that in case the plaintiff does not prevail, he shall be liable to *double costs*. Nothing is said in this statute of the judges of the higher courts. This silence shows that the legislature did not suppose the judges of those courts liable to such actions, otherwise, provision would have been made to protect them, also, from vexatious suits. This act also shows that the legislature intended to restrain such actions, even in regard to inferior magistrates.

T. A. Emmet, in reply. It is said that Mr. *Yates* is a convict of record. It is true, that it is so stated in the pleadings. The Court of Chancery, as a court of equity, is not a court of record. The orders are of record, but not that the conviction was well founded. The plaintiff was not examined on interrogatories. The established mode of proceeding, in case of a contempt, is first to grant a rule to show cause why an attachment should not issue; and if no cause is shown, the attachment issues, and the party is brought into court; interrogatories are filed, and on the answers of the party, the master reports whether the party is in contempt. The party is not bound to speak, until called upon by interrogatories. We complain, then, that the plaintiff has been condemned unheard. Again, it is said that the commitment was for the non-payment of the costs. Three things are recited in the order; the dismissal of the bill, the payment of costs, and the commitment for malpractice and contempt. The last had no reference to the first and second. The costs were to be collected in the or-

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dinary way, by an attachment for the non-payment of them. Remuneration was not the object of the commitment. It was solely for the malpractice and contempt. But we have supposed that this and the other points which could arise, except the question of judicial inviolability, were definitely settled by this court, in the case of *The people v. Yates*; and that the only point for discussion in this *cause was, whether the defendant was liable for the penalty. But this court of *dernier resort* has been called on to do, what no such court ever did, to overturn its former decisions. Inferior courts, it is true, have changed, and may change their decisions. But if the decisions of the court of the *last resort* are not to be permanent and unalterable, then there is no such thing as settled law. The decision in the case of *The people v. Yates*, as soon as it was pronounced, was the established law. Is it to be changed because it is recent, and as yet in the gristle? Must it be ossified by time, before it can be fixed? The decisions of this court are and must be the law, until altered by the legislature. In *England*, in consequence of the decisions of their courts, the act of 10 and 11 *Wm. III. c. 16*, was passed to enable *posthumous* children to take in remainder, in the same manner as if they had been born in their father's life-time. (3 *Bl. Com.* 169. and *note* by *Christian*.) It is absurd, then, to cite all the authorities and cases on points which this court has already settled. Why is this court called upon to change its decisions, and to subvert the maxim *stare decisis*? Is every thing to be set afloat, and the character and consequence of the court to be lost? If it can thus change its decisions, the court itself ought to be changed. If its decisions are wrong, let them be set right by the legislature. But, if the court itself can alter its decisions, it is in vain to study the law. I protest, therefore, against going into an examination of the points already decided by this court, though I may be obliged incidentally to notice some of them.

It has been said that the *English habeas corpus* act and that of this state are substantially the same, and are to receive the same construction, and that the former was intended to guard against the power of the crown and its ministers. But as there is no king, nor lords, nor secretaries of state here who can commit, that could not be the object of our statute.

Again, it is said that the act does not extend to convictions, or persons imprisoned on conviction; but if this statute gives no supervisory power, what will be the consequence in regard to the convictions of inferior magistrates? If a person should be seized by lawless force, to be carried out of the country, how is he to be relieved in vacation, unless the statute extends to imprisonments generally? Suppose a person, unjustly and wrongfully confined, by order of a magistrate, upon an allegation of being a lunatic, how is he to be liberated unless by the statute?

But according to the practice of the judges of the Supreme Court, persons convicted have frequently been discharged on

habeas corpus. *Benedict Lewis*, in *October*, 1807, and *Hannah Clap*, in *October*, 1810, who had been convicted under the act relative to disorderly persons, were brought before the *Chief Justice* on *habeas corpus* and discharged. Many years ago, *William Kettletas*, who had been committed for a contempt, by order of the assembly, was, after the adjournment of the legislature, brought before Mr. Justice *Benson*, on *habeas corpus*, and discharged by him. Several other similar cases, before other judges of the Supreme Court, might be mentioned.

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Again, it is said that the statute extends only to *bailable offences*. But the power to bail does not depend on the statute. It is a distinct and separate power. At common law, a person may be bailed, without being brought before a judge. (*H. P. C.* 126.) This statute would be useless, if confined to imprisonments for bailable offences. Is, then, this great remedial statute to be placed as an idol in the temple, without eyes, without hands, without ears, without intellect or sense; to be worshipped by the ignorant, and laughed at by the cunning?

It is said we must construe the act in reference to the preamble. No. The preamble was struck out because it was false and inapplicable to this country. It was struck out, that the legislature of the state might go beyond the *English* act; that they might soar above that statute, weighed down to earth, as it was, by the doctrine of *impressment*. Our act was intended to extend to every case of imprisonment. In *England*, the *habeas corpus* act is a political engine. I adjure this court to consider the dreadful mischiefs which would result from limiting this act according to the construction which has been given. No respect for any individual, however high in office, and respectable, or however upright his intention, should influence this court to sacrifice a law, so essential to the administration of justice, and the protection of the citizen.

It has been said that a judge has no power to compel a return of the cause of conviction; but all commitments of inferior courts, or magistrates, must set forth the cause, otherwise they are void.

A person legally convict cannot be discharged, but a person convict by illegal process, may be discharged. A comma should be placed after the word convict, and after execution, and then the words "legal process," will properly read as applicable to convict.

Another objection is, that the power of the judge in vacation, and that of the Supreme Court are different; but except as to cases of treason and felony, their powers are precisely the same. It is said that such a power in a judge would be liable to abuse. So is all judicial power liable to abuse; but it must be confided. That it may be abused, is no reason why it should not be given. The law places a just confidence in the judges, that they will act with caution and deliberation, and will not abuse their discretion.

Unless such a power had been given to judges in vacation,

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of supervising convictions, and relieving persons illegally imprisoned, the greatest oppression would be practised. The party must wait weeks before he can apply for a discharge.

Thus much it seemed necessary to say, in answer to the objections which have been raised.

It remains to examine what we conceive to be the only real point of discussion in this cause, that is, the extent of judicial responsibility.

The *Chief Justice*, in delivering the opinion of the court below, (5 *Johns. Rep.* 290—298,) admits that where courts of special and limited jurisdiction exceed their powers, the whole proceedings are *coram non judice*, and all concerned in them are responsible. He asserts the inviolability of the judges in a threefold view; 1. Where a court of special and limited jurisdiction acts within the sphere of that jurisdiction:

2. That this protection, or irresponsibility, is *absolute* and universal, as to the judges of the superior courts of general jurisdiction, such as the Court of Chancery, and Supreme Court:

3. "That the law," in the language of *Hawkins*, (b. 1. c. 22. s. 6,) "has freed the judges of all courts of record from all prosecutions whatsoever, except in parliament, for every thing done by them openly in such courts, as judges."

The first position, though, perhaps, susceptible of restriction, is admitted to be true at common law.

The third position appears to be an extension of the second position, and to lay down that the absolute and universal protection there spoken of, is afforded, not only to the superior courts of general jurisdiction, but to every *court of record*, from the highest to the lowest, whether of general or limited jurisdiction: and, perhaps, it will be found that those superior courts have no more absolute or universal protection, than any other court of record; and that as good authority is to be found for the one position as the other. But if the exception to the first position, as to the court exceeding its powers, be true, there must be an error in the *third position, for many courts of record are courts of inferior and limited jurisdiction; such as the *Marshalsea* Court in *London*; all corporation courts, and courts leet in *England*; courts of common pleas in the several counties of this state, and the justices' courts in the city of *New-York*.

This position, in its extended sense, is not only contrary to the exception in the first position, which is admitted to be undoubted law, but is contrary to the decision in the *Marshalsea case*, and is not supported by any authority whatever; for in every case in which the position is at all laid down, the judge was undoubtedly acting within his jurisdiction; and the only question was, whether any proceedings could be had against him, for corruption, misconduct, or violence in the discharge of duty, while acting within his jurisdiction.

In the case of 27 *Edw. III.* pl. 18. *Lib. Assisarum*, A. as a judge of *oyer and terminer* had jurisdiction both of trespass

and felony, and in every entry on the record, however corrupt his conduct was, he certainly was acting within his jurisdiction. The principle of that case is, indeed, perfectly inapplicable to the position laid down. It was, that an indictment would be an averment against the verity of a record. (12 Co. 24. b. 25. a.) In truth, this difficulty of averring against a record is the reason why the expression of judges of record, &c. is so frequently used; as that circumstance frequently created an impossibility of proceeding against them, which did not exist as to judges not of record.

In 9 *Hen.* VI. 60. pl. 9, a writ on the case was brought against *A.*, setting forth, that the said *A.*, when he was *escheator*, &c., took an office, or inquest, by twelve jurors, and alleged the office in certainty, and how he had returned another office contrary to this. *Fulthan* said, this action does not lie, for this office was taken by virtue of a writ, and so it is in some sort a judgment of record. *Babington* said, such an action could not be maintained against a justice of record; but in that case, it would lie, for an escheator is not a justice of record; but an officer of record. *Martin* compared it to a false return by a sheriff, who is also an officer of record, that is, not a judicial but a ministerial officer, and, therefore, the office, when returned by him, was not a record.

The case in 9 *Edw.* IV. 3. pl. 10, was an action of trespass, assault and battery. The defendant said, that at the time of the alleged trespass, he was a justice of the peace, and the plaintiff made an assault on one *B.*, and to preserve the peace, the defendant* came and charged him to keep the peace, and he would not, wherefore he peaceably put his hands on him and arrested him to find sureties for his good behavior, which was the same assault for which the plaintiff brought his action. The plaintiff contended, that as he had not been put in gaol, the purpose was never executed, and, therefore, the first arrest was *tortious*. *Choke* said, when the defendant arrested the plaintiff it was good, and when he let him go at large, it was for his advantage, but it would be otherwise as to a sheriff, &c. *Littleton* added, justices of the peace can at their discretion arrest a man to find surety, and although he should let him go at large without surety, still the party cannot punish him; for he is a judge of record. In this case the defendant was clearly acting in his jurisdiction.

In 21 *Edw.* IV. 67. pl. 49, *Catesby* came to the bar and moved, that there was no difference in *conspiracy* between a juror who is indicted and a justice of the peace; but both shall be always excused. *Pigot* said, this is not just; for the juror takes the indictment on his oath, and although he has done wrong, in speaking before that time, yet the law intends when he comes to take the oath that he will say the truth: but justices of the peace have no such excuse for speaking and conspiring before the sessions. *Catesby* said, the justices of the peace are sworn to do their duty, as well as the jury is on the indictment; and when a man comes to him before the sessions,

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and shows that he has been robbed by such a person ; and shows the suspiciousness of the act and the circumstance, the justice may demand of him different questions, and on this he is held to inform. *Brian* said, it is good (if you do so) that you be assisted with the other justices of the peace, for one justice cannot take nor hold sessions singly, nor do any thing singly, but take sureties of the peace ; and therefore he cannot take this information singly, and for what he does in the sessions, he is excusable, but not for speaking out of it. *Choke* said, it is hard that justices of the peace cannot take informations out of the sessions ; and if an indictment was shown to *Catesby* and *Pigot*, king's serjeants, whether it was sufficient, they might communicate of the manner and the matter of the indictment by law. *Pigot* said, a justice of the peace, during the time of the session, may take information of the king ; but if he does any thing beyond his office, he is punishable, although he is a judge of record, &c.

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*The doctrine of this case is laid down too broadly by the *Chief Justice* ; it was not maintained by all the judges ; nor did it extend to a general irresponsibility. It is only, that for what a justice did in the sessions, in his office, he was not amenable *as for a conspiracy*. And many cases of irresponsibility of judges, as for a conspiracy, may be found in the *Year Books*, some of which are referred to in 12 Co. 23. And that case, *Floyd and Barker*, does not lay down any rule of general exception, but is confined strictly to not being answerable as for a conspiracy. The language of that decision is not fully stated by the *Chief Justice*. It is there said, that the judges are "not to be drawn into question *for any supposed corruption which extends to the annihilating of a record* of any judicial proceeding before them," &c. "except it be before the king himself," &c. "And the reason why a judge, for any thing done by him as a judge, by the authority which the king hath committed to him, and as sitting in the seat of the king, (concerning his justice,) shall not be drawn in question, *for any surmise of corruption*, except before the king himself, is for this," &c. There is nothing in that case which goes beyond a protection from responsibility for a *conspiracy* or corruption, as to any thing done within his jurisdiction.

(a) The judges were *Moun-
tagne*, Ch. J.
Doderidge,
Chamberlaine
and *Haughton*,
Jr.

Arie v. Sedgwick (2 Roll. Rep. 197. Vide Cro. Jac. 582. 601) was an action on the case for taking a false oath in the Court of Chancery. *Noy* was merely counsel, (a) and he cited a case in 30 and 31 Eliz. in *B. R.* in which it was adjudged that if one gives evidence against a felon, who committed no felony, and when no felony was committed, that an action on the case lies against him ; no action on the case lies against a judge for any thing which he does as judge ; and he cites several other cases from the *Year Books* to the same effect. His positions relate only to things done in the course of justice.

Hammond v. Howell (1 Mod. 184. 2 Mod. 218) was decided on the same principle. It was contended that although

the trial of *Penn* and *Mead*, and the taking of the verdict was within the commission, yet the fining of the jury and the imprisonment of them were not within the commission. But the court repelled this doctrine, and held that "the court at the *Old Bailey* had jurisdiction of the cause, and might try, and had power to punish, a misdemeanor in the jury to acquit the prisoners, which in truth was not so, and therefore it was an error of judgment for which no action will lie." The case of **Groenvelt v. Burnwell* (12 Mod. 886) goes on the same principle that the court had jurisdiction, and on the principle laid down in 12 Co. that being a judge of record, there could be no averment against the record, as to the maladministration of physic. This appears from the second and fifth points in the case, and from the last point. The *dicta* in *Miller v. Searl and others*, (2 Bl. Rep. 1145,) show pointedly, that as to judges of courts of record, the exemption (if they be of limited jurisdiction) is only where they act within that jurisdiction; and the *dictum* of Lord *Mansfield*, in *Mostyn v. Fabrigas*, (Cowp. 172) is of the same kind. The case of *Phelps v. Sill* (1 Day's Cases in Error, 315) is obviously a case where the court was acting within its jurisdiction, and the action was brought for a mere error in judgment.

There remains, then, only the authority of *Hawkins*. The passage cited from his book contains a *dictum* only of that writer. It is found under the title *Conspiracy*, and is to be understood as applicable only to cases where a judge is not responsible for a conspiracy. If he intended to lay down the doctrine in broad and general terms, as to the irresponsibility of judges of courts of record, he is contradicted by what he himself says, in another place. (B. 1. c. 28. s. 4, 5, 6.) "The judgment by virtue whereof any person is put to death must be given by one who has jurisdiction in the cause; for otherwise, both *judge* and officer may be guilty of felony." "And, therefore, if a court of common pleas give judgment on an appeal of death, or justices of the peace on an indictment for treason, and award execution, both the judges who give, and the officers who execute the sentence, are guilty of felony; because these courts having no more jurisdiction over those crimes than private persons, their proceedings thereon are merely void, and without any foundation. But if the justices of peace, on an indictment of trespass, arraign a man for felony and condemn him, and he be executed, the *justices only* are guilty of felony, and not the officer who executes the sentence; for the justices had a jurisdiction over the offence, and their proceedings were irregular and erroneous only, but not void." He is contradicted, also, by the opinion in the case of the *Marshalsea*, (10 Co. 66—76,) and by *De Grey*, Ch. J. in *Miller v. Searle*, (1 W. Bl. 1141,) that "in all the cases where protection is given to the judge giving an erroneous judgment, he must be acting *as judge*;" that is, he must be **acting* within his jurisdiction. If the court below meant no more than that a judge, acting within his jurisdiction, is not to be responsible for an error of

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judgment, that doctrine is not denied. It is laid down by *Coke*, and has never been disputed; but if the *Chief Justice* means to go further, and say that a judge of a superior court is not responsible, when acting beyond his jurisdiction, then, we humbly contend his position is not law. The second position of the court goes to the absolute and universal irresponsibility of the judges of superior courts, whether they have jurisdiction or not. It has no other support than the *dictum* of Lord Chief Justice *De Grey*, and is contrary to the rule as broadly laid down in 10 Co. 76. a. and to *Hawkins*. (P. C. b. 1. c. 28. s. 5. *Bac. Abr. Murder and Homicide*. E. 1.)

All superior courts are, in some degree, limited in their jurisdiction, and there is no reason why they should be more protected than courts of inferior and more limited jurisdiction. If the law grants this protection, in charity to the frailty of human judgment, surely this charity ought to be extended to judges of inferior courts, who possess less learning and experience to guide their judgment.

The only distinction I know of, in this view of the subject, between courts of superior and inferior jurisdiction, is the one laid down in *Jennings v. Hankyn*, (*Carth.* 11,) where the party moved in arrest of judgment, that the bond was in the *county palatine of Chester*, and so the Court of K. B. not having jurisdiction, the proceedings were *coram non judice*: and the court said, "that the party by pleading in chief, had admitted the jurisdiction, and could not make the objection afterwards;" for "it was not like a court of limited jurisdiction, holding plea of a cause arising without it, for there all is void as *coram non judice*." With respect to inferior courts, the judge must protect himself by expressly showing that he acts within his jurisdiction; but as to superior courts, that shall be presumed in their favor, unless the contrary be shown.

But admitting the position, on the other side, to be true, it can only be applied to actions, at common law, for *torts*. It is not applicable to an action expressly given by statute for a penalty. The statute, by giving the penalty, has said that the judges shall not have that immunity.

The words "*done of record*" have no application to what a judge does when acting beyond his jurisdiction. What a judge does out of his jurisdiction is not done of record.

Then what is meant by the words of the statute, "having jurisdiction *of a cause?" Jurisdiction is the power to try or *jus dicere super causam*. It is not enough that the court should have jurisdiction of the "*subject matter*;" it must have jurisdiction of, or a power to try, the individual cause. Because the chancellor has jurisdiction in regard to *contempts* in his court, it does not follow that he had jurisdiction, after the discharge of Mr. *Yates*, of the particular cause. I do not mean to say whether the *chancellor*, after the discharge of Mr. *Yates*, might not have granted a rule upon him to show cause, and have proceeded against him for the contempt; but after the discharge, the particular cause was *res judicata*. It is un-

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necessary, therefore, to answer the question whether the discharge exculpated Mr. *Yates*, or not, or whether the *chancellor* might not have proceeded against him as in a new cause. What we contend for is, that the defendant had no right to commit again in the same cause. The defendant, however, chose to adhere to this particular cause, and to vindicate his authority, and prove his power superior to that of Mr. Justice *Spencer*. He proceeded with the law before him; he meant to test and try the law; and was willing to put his power at hazard on this point, and to risk the consequences of the statute.

As a judge, in vacation, has no power to enforce obedience to his order by any process for a contempt, the statute has provided the sanction of a penalty, in order to compel that obedience. Every person who refuses to obey the order of discharge is made liable to the penalty.

It is said, that the penalty is given only against persons acting ministerially or extra-judicially. But are not persons acting ministerially, and who are bound to obey, more protected than the judges? Shall the *officer* be liable to the penalty, and the *judge* escape? If the officer is bound, under the penalty, not to obey; is it not clear that the judge cannot have jurisdiction? A judge is only a judge, when he acts judicially or within his jurisdiction. If he acts beyond his jurisdiction, he is, as to such act, a *person*, not a *judge*.

Though in the first section of the act, the word *court* is used, yet where the *penalty* is given, the word *person* is used. If the chancellor, or judge of the Supreme Court, in vacation, upon view of the warrant of commitment or detainer, or on oath of a copy being denied, shall refuse to *allow* a writ of *habeas corpus*, he shall forfeit to the party aggrieved 1,250 dollars. The allowance of a writ of *habeas corpus*, we contend, is a *judicial* act; and the *judge* is compelled, under the penalty, to exercise his judicial discretion; and if he refuses to allow a *habeas corpus* to which the party is entitled, will an error of judgment protect him against the penalty? This, then, is contrary to the common law doctrine, that a judge is not responsible for an error of judgment. And does not the *fifth* section equally entrench on that doctrine, and make a judge liable for recommitting a person discharged under a *habeas corpus*, though he does it under a mistake? The penalty extends to every judicial character who should disregard the discharge; and without such a penalty, the power of a judge in vacation would be impotent and ineffectual. The act says "any colorable pretence or variation in the warrant of commitment notwithstanding." A ministerial officer will not alter the warrant; but the court or judge who has the power of commitment. The penalty being given as the sanction of the judge's authority in vacation, it must be so construed as to be a competent sanction, and affects judges, otherwise, they would disregard the discharge. It follows, that when the judge has a right to discharge, the penalty attaches on whoever recommitts. And

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it has been settled by this court that Mr. Justice *Spencer* had a right to discharge.

The consequences of the construction for which we contend have been depicted in strong colors; but suppose the act had said, in express terms, that no judge of the Supreme Court, or any other court, should recommit a person who had been discharged by *habeas corpus*, in vacation, those evil consequences would not have been supposed or apprehended.

Lewis, Senator, was of opinion that the judgment of the Supreme Court ought to be affirmed, and gave his reasons at length. (a)

(a) The reporter, not being present at the time, is unable to state them.

PLATT, Senator. In examining this interesting case, two cardinal points are presented:

1. Had the chancellor a right to recommit the plaintiff, after the discharge by Mr. Justice *Spencer*?

2. If he had no such right, is he liable for the penalty now claimed?

The consideration of the first question involves an inquiry:

1. Whether the original commitment by the chancellor was legal?

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*2. Whether Mr. Justice *Spencer* had a right to revise the adjudication of the chancellor, in the matter of complaint against *John V. N. Yates*; and discharge the prisoner on *habeas corpus*?

3. Whether the recommitment of Mr. *Yates* by the chancellor, after the actual discharge by Mr. Justice *Spencer*, was lawful?

Before I proceed to examine these questions, it is proper to notice a preliminary objection insisted on by the counsel for Mr. *Yates*. They contend that the door to these inquiries is now shut, by the decision of this court, at its last session, in the case of *John V. N. Yates* and *The People*.

I cannot admit the doctrine of *immutability* in the decisions of this court, to the unqualified extent claimed by the plaintiff's counsel.

The decisions of courts are not *the law*; they are only *evidence of the law*. And this evidence is stronger or weaker, according to the number and uniformity of adjudications, the unanimity or dissension of the judges, the solidity of the reasons on which the decisions are founded, and the perspicuity and precision with which those reasons are expressed. The weight and authority of judicial decisions depend also on the character and temper of the times in which they are pronounced. An adjudication at a moment when turbulent passions or revolutionary frenzies prevail, deserves much less respect, than if it were made at a season propitious to impartial inquiry, and calm deliberation.

The peculiar organization and practice of this court, renders it difficult to establish a system of precedents. In the Supreme Court the judges confer together, compare opinions, weigh each other's reasons, and elicit light from each other. If they agree, one is usually delegated by the others, not only to pronounce

judgment, but to assign reasons for the whole bench. But even in that court, and in the courts of *Westminster Hall*, the judges who silently acquiesce in the result, do not consider themselves bound to recognise as law all the *dicta* of the judge who delivers the opinion of the court.

In this court, the members never hold any previous consultation together; we vote, for the most part, as in our legislative capacity. Few assign any reasons, and fewer still give written opinions which may be reported. For these reasons, I think it would be extravagant and dangerous, to consider the *dicta* and opinions *of a single member, as settling* definitively the law of the land, on all the points on which he chooses to give opinions, or to assign reasons.

In the case of *J. V. N. Yates*, at the last session, only one member (Mr. Clinton) gave a written opinion, or assigned reasons for reversing the judgment of the Supreme Court. (6 *Johns. Rep.* 496.) A majority of the members voted for reversing that judgment; but whether upon the grounds taken, and the reasons assigned by Mr. Clinton, it is impossible to know. It is certain that a majority agreed in the result; but there is no certainty that any two of that majority, grounded their opinions on any one of the various points that were discussed and relied on by Mr. Clinton.

One point insisted on in the eloquent opinion of that senator, was, that the recommitment by the chancellor was by *order*, and that it ought to have been by attachment. (5 *Johns. Rep.* 512.) This was a material question in the former record. It may be that the other members of the court who voted for the reversal of that judgment, rested their opinions on that point alone; and if so, that decision has no bearing on the present question.

This suit is for the penalty for recommitting after a discharge on *habeas corpus*; and the question is not as to the *mode*, but as to the *right* of recommitting. If the recommitment was "knowingly contrary to the statute," it is immaterial whether it was by *order*, or by *attachment*; for the defendant is equally liable in both cases.

If that question were material in this case, it might be shown that *courts of record* may commit by *order*, or by *writ*; but a magistrate, not sitting as a court of record, can commit only by *warrant*, under his hand and seal. (2 *Hale's P. C.* 122. 2 *Roll. Abr.* 559. *Taylor v. Beal.*)

Considering the questions which now arise, as not necessarily prejudged by the former decisions of this court, I shall now proceed to examine them, on the general grounds of reason and authority.

The right of punishing for contempts by summary conviction, is inherent in all courts of justice, and legislative assemblies; and is essential for their protection and existence. It is a branch of the common law, adopted and sanctioned by our state constitution. The discretion involved in this power is, in a great measure, arbitrary and undefinable; and yet the ex-

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perience of ages has *demonstrated, that it is perfectly compatible with civil liberty, and auxiliary to the purest ends of justice.

The known existence of such a power prevents, in a thousand instances, the necessity of exerting it; and its obvious liability to abuse, is, perhaps, a strong reason why it is so seldom abused.

This power extends not only to acts which directly and openly insult, or resist the powers of the court, or the persons of the judges, but to *consequential, indirect and constructive contempts*, which obstruct the process, degrade the authority, or contaminate the purity of the court. (4 Bl. Com. 280. 2 Hawk. b. 2. c. 22. 1 Com. Dig. Attachment, A.)

The *officers* of the court are peculiarly subject to its discretionary powers, and may be punished in this summary manner, for oppression, extortion, negligence or abuse in their official capacity. (1 Bac. Abr. tit. Attachment. 2 Hawk. tit. Attachment. 3 Atk. 568.)

A contempt is an offence *against the court*, as an organ of public justice; and the court can rightfully punish it on summary conviction, whether the same act be punishable as a crime or misdemeanor, on indictment, or not. To challenge a senator or a judge, may, under circumstances, be a contempt; but is certainly indictable. A conviction on indictment will not purge the contempt; nor will a conviction for a contempt be a bar to an indictment. The offence may be *double*; and so are the remedy and the punishment. For instance, assaults in the presence of the court, *rescous*, extortion, libels upon the court or its suitors relating to suits pending, forging a writ, &c. are *indictable* offences; and certainly they are also *contempts*.

Contempts are never merged in statute offences, without express words for that purpose.

In this case it appears that a complaint was made to the chancellor against the plaintiff, by *Samuel Bacon*, a suitor, founded on his own affidavit, and the affidavits of *Peter W. Yates* and *Richard S. Treat*; charging that the plaintiff, being a master in chancery, filed a bill, on behalf of *Samuel Bacon*, and subscribed to it the name of *Peter W. Yates*, one of the solicitors of that court, without the knowledge or consent of *P. W. Yates*; and had acted as solicitor in the prosecution of the cause, under the assumed name of *P. W. Yates*. It also appears by the order of conviction, that the plaintiff "*was regularly required*" to answer this complaint before the chancellor; and that he did not appear to answer it. *Whereupon, the chancellor made an order in the minutes of the court, "that the bill be dismissed, that the said *John V. N. Yates* pay all the costs accrued in the suit; and that the said *J. V. N. Yates* be committed. *for his said malpractice and contempt.*" An attachment accordingly issued; and the plaintiff was arrested and imprisoned under it.

After reciting the facts charged against the plaintiff in the

order of conviction, and in the attachment, these words are added, "contrary to the statute in such case made and provided, in wilful violation of his duty as master, and in contempt of the authority of this court."

The question here presented is, whether the chancellor had a right to make this order, and to issue this attachment?

I am of opinion that the order is clearly a conviction for a *contempt*, and in legal construction imported nothing more. The words "contrary to the statute, in wilful violation of his duty as master, and in contempt of the authority of this court," in the connection in which they stand, are mere *expletives*, showing a strong sense of the indignity offered to the court; but are not a substantive ground of conviction. If those words had been omitted, the conviction would have been complete; and I think its legal import is the same *with* or *without* those words.

Suppose that instead of those words, the order had stated that the facts charged were "contrary to the precepts of our holy religion;" would it be contended that the order was void, and that the chancellor had usurped ecclesiastical powers? Suppose he had stated that the conduct of Mr. *Yates* was "contrary to the laws of all civilized countries," would it be said he had assumed universal jurisdiction under those laws? *Utile per inutile non vitiatur.*

The attachment recites the order or adjudication of conviction, and "therefore" commands the sheriff to imprison *John V. N. Yates*, "until the further order of our said court."

I consider this writ as an attachment for a contempt; and I think it a distortion of its plain import, to say that it implies any assumption of criminal jurisdiction, or that the chancellor held cognisance of, or meant to punish, the acts complained of, as a statute offence.

That the acts of fraud, imposition and extortion, of which Mr. *Yates* was so convicted, amounted, in judgment of law, to a high-handed contempt, I have no doubt; and that it was the right and the duty of the chancellor to punish him for it, and to compel *him *summarily*, to reimburse the money he had extorted from the suitor, is equally clear.

It is contended that the attachment is illegal, because it was founded on conviction without an examination on interrogatories.

To this objection several answers occur: 1. It does not appear from the attachment, whether there was such an examination or not; nor does the law or usage require that the whole proceedings which led to the conviction, should be recited in the attachment.

2. If we recur to the conviction, or order for the attachment, it appears that Mr. *Yates* refused to answer the complaint, "although regularly required so to do;" and I think such refusal to answer, is not only a waiver of the right of being examined on interrogatories, but an admission that the complaint was well founded.

3. That the chancellor had a right to dispense with such

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examination, if in his judgment the proof by affidavits is sufficient in itself, and of such credit, as that a denial by the party accused, under oath, would not countervail the affidavits. (*King v. Vaughan, Doug.* 516. 4 *Bl. Com.* 284.)

4. We are not now deliberating on an appeal from chancery. We must confine ourselves to the record brought here by the writ of error. The only question is, whether the judgment of the Supreme Court is right; and, of course, we have no more power to examine the proceedings which led to the conviction, or the grounds of the adjudication in chancery, than the Supreme Court had. If there was no essential defect on the face of the attachment, and it purported to be an attachment for a contempt, we are bound to presume that the conviction on which it issued was regular and well founded.

The last objection to the original commitment is, that it was "until the further order of the court;" and, therefore, it is not definite and terminable, either by the efflux of time, or on the doing of some act by the prisoner.

The object of this commitment was to compel remuneration to the injured suitor; and also to punish Mr. Yates for contemning the authority of the court, and polluting the streams of justice. It was impossible to foresee when he would indemnify the suitor, and make satisfactory atonement for his affront to public justice; there seems, therefore, an obvious propriety in directing the imprisonment "until the further order of the court." It is equivalent to saying, as in common warrants, "until he be delivered by due course of law." It is, in fact, as definitive as the nature of the case would admit; for if it had been "until he makes satisfaction to the injured party, and acknowledges his contrition for his offence," the court must, at last, judge of the compliance; and it would in either case be, in effect, during the pleasure of the court.

I think it, however, a sufficient answer to say, that the precedents uniformly agree with the form of this attachment, in that respect, and that the established usage in all our courts, and in the *English* courts, distinctly traced back to the *Year Books*, also corresponds with it. This long usage proves that it is wise and safe. But if it be in itself wrong, we have a right to apply the maxim, *communis error facit jus*.

The commitment of *George Clarke* for a contempt, at the last session, was "during the pleasure of the senate." It has been said that "such an imprisonment ceases with the adjournment of the legislature, and is, therefore, terminable on the happening of that event." (Opinion of *Clinton*, Senator, 6 *Johns. Rep.* 506, 507.) But to this it may be answered, that the imprisonment does not necessarily, or of course, cease with the adjournment. The prisoner can then be released only on *habeas corpus*; and I trust it will not be contended that a commitment is legal, wherever it leaves the prisoner liable to a discharge on *habeas corpus*. Besides, the adjournment of the legislature depended on their own volition, subject only to the right of prorogation by the governor. It was,

therefore, an imprisonment *during pleasure*, in the largest sense, and not terminable by the efflux of time. There was no certainty that the senate would ever adjourn. The house of assembly expires annually, but the senate exists in perpetuity.

I have now arrived at the conclusion that the original imprisonment of Mr. *Yates* was a *legal commitment*, upon a conviction for a *contempt*.

The next question is, whether Mr. Justice *Spencer* had a right to discharge Mr. *Yates* on *habeas corpus*, from his imprisonment under the attachment of the Court of Chancery?

Serjeant *Hawkins* (b. 2. c. 15. s. 73. 76) shows, that the superior courts pay the highest regard to each other's decisions, and will presume them to be agreeable to law, unless the contrary expressly appears.

*Since the violent contest between the Court of Chancery and the King's Bench, in the reign of *James I.* the *English* authorities uniformly show a scrupulous forbearance in their courts to interfere with each other's proceedings, in matters of contempt. The case of *Chambers* (*Cro. Car.* 168) exemplifies this remark. He was committed for a contempt, and upon being brought into the King's Bench, on *habeas corpus*, he was remanded, and the court said "it is not the usage of this court to deliver one committed by the decree of one of the courts of justice." Such has been the uniform tenor of *English* decisions down to the era of our independence. This principle has been so fully recognised by our courts, that no question has arisen upon it before the present case. It is founded on this strong reason, that these superior courts are *coördinate*. Equal confidence is reposed in their learning and integrity; and it is, therefore, unfit that one should assume a right to judge of the other's proceedings, especially as the constitution has provided a tribunal for the express purpose of correcting their errors.

Such an exercise of power by the *Supreme Court* would distort the symmetry and proportion of our system of appellate jurisdiction; but the deformity is still more glaring when the power is exercised by a *judge in vacation*.

The case of *Gist v. Bowman*, (2 *Bay's Rep.* 182,) in the Supreme Court of *South Carolina*, in the year 1798, bears a strong analogy to the present case. *Bowman* was committed for a contempt, by an *order* of one of the three chancellors, who composed the Court of Chancery in that state; and being brought before the Supreme Court, on *habeas corpus*, a question was made whether *one* of the three chancellors was competent to make such an order of commitment; and it was unanimously decided that the prisoner was not entitled to be discharged by the common law judges; that the *habeas corpus* act did not embrace the case; that the Supreme Court had no jurisdiction, and that they ought to refer the question to the Court of Chancery. This doctrine is great authority, because

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it was made by the highest tribunal of a sister state, whose civil institutions are congenial with our own.

It seems to be conceded that a judge *in vacation* had no power, at common law, to allow a *habeas corpus*, or to make any order in relation to it. His power, in that respect, is derived solely from the statute called the *habeas corpus* act. Judge *Spencer*, in this *instance, marked the writ "*by statute*," and thereby evinced that he claimed jurisdiction under the statute only.

I cannot perceive any difference between our *habeas corpus* act and that of *Great Britain*, in relation to the point now before us. Whether a judge in vacation has any powers under this statute, other than to bail persons committed for trial, or to keep the peace, and answer indictments, is a question which, perhaps, need not be decided in this cause. There seems, however, strong ground to conclude, that his power "extends only to cases of commitment for such criminal charge as can produce no inconvenience to public justice, by a temporary enlargement of the prisoner; all other cases of unjust imprisonment being left to the *habeas corpus* at common law," which can only be issued in term. (3 *Bl. Com.* 137. 10 *Mod.* 429.) It is, however, very clear from the express exceptions in the statute, that a judge *in vacation* has no right to discharge "persons convict, or in execution by legal process."

In examining the original commitment by the chancellor, my judgment is satisfied, that it was neither *more* nor *less* than a commitment on a conviction for a *contempt*. I am, therefore, obliged to conclude that the decision of his honor Judge *Spencer* was erroneous on that point. I think Mr. *Yates* was, in the true sense of the third section of the *habeas corpus* act, "a person convict, or in execution by legal process," and, therefore, expressly within the exception to the powers given to the judge by the statute under which he discharged the plaintiff.

Mr. *Yates* was, however, *actually discharged* by Judge *Spencer*; and this brings me to the next inquiry, whether the recommitment by the chancellor, *after the actual discharge* by Mr. Justice *Spencer*, was lawful?

The fifth section of the *habeas corpus* act declares, "that no person who shall be set at large upon any *habeas corpus*, shall be again imprisoned for the same offence, unless by the legal order or process of the court wherein he is bound by recognisance to appear, or *other court having jurisdiction of the cause*."

I think Mr. Justice *Spencer* exceeded his jurisdiction in discharging Mr. *Yates*, and, of course, that discharge was unauthorized and void. It had no more legal operation or effect, than if the *habeas corpus* act had never existed; and the right of recommitment by the chancellor rests on the same footing as if Mr. *Yates* had been discharged on the order of any private citizen.

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*In discharging Mr. *Yates*, Judge *Spencer* acted *ministeri-*
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ally, or if *judicially*, he acted as a court of *special* and *limited* jurisdiction under the statute, and the proceeding was *coram non iudice*.

In my judgment, the chancellor had originally "jurisdiction of the cause," that is, of the *cause of commitment*, which was "for malpractice and contempt;" and, of course, this presents a case clearly within the exception in the fifth section of the statute.

If it be a case within that exception—if Judge *Spencer* acted *extrajudicially*, in discharging the prisoner, it seems to me against sound legal discretion to contend that such a discharge, by a person having no right to make it, can be effectual and conclusive to rescue a prisoner in execution for a contempt, and to exculpate him from the guilt established by his conviction.

The Court of Chancery not only had "jurisdiction of the cause," but *exclusive jurisdiction*. No court can punish for contempts of another court. And if the discharge by the judge is conclusive, whether right or wrong, and whether he had jurisdiction or not, it must result, that a man who stands convicted of a gross contempt against the Court of Chancery, and a daring affront to public justice, may, without satisfaction, and without pardon, escape all punishment, and bid defiance to all the constituted authorities of the state.

Such a doctrine would go to prove that a judge in vacation has not only a power to revise the decisions of every court in the state, but that, *in effect*, he may exercise the power of pardoning convicts. Suppose a person convicted of murder, or treason, and on writ of error the Supreme Court pronounce judgment of death, and the executive refuses to respite the sentence, can the idea be tolerated, that a judge of the Supreme Court, in vacation, or a recorder of *New-York*, *Albany* or *Hudson*, (who have equal powers,) may conclusively discharge the culprit on *habeas corpus*, at the moment of execution? Such a despotic control over judicial decisions, and executive discretion, would, indeed, secure the personal liberty of *one man*, but its inevitable tendency would be to *enslave millions*.

For these reasons, I think the chancellor had a perfect right to recommit Mr. *Yates*, for the same offence. He was equally liable to recommitment as if he had escaped from prison, or been rescued by violence.

But if I am mistaken in every position which I have laid down, *there still remains this solemn and important question; is the defendant responsible, in this action, for acts done by him officially and judicially as chancellor of this state?

In order to give a just construction of the fifth section of the *habeas corpus* act, which gives the penalty claimed by the suit, it is necessary to examine the law generally in regard to the responsibility of judicial officers.

Serjeant *Hawkins* (b. 1. c. 7. s. 6) lays down this general rule, "that the law has freed the judges of all courts of record

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from all prosecutions whatsoever, except in the parliament, for any thing done by them openly in such courts as judges." The *English* authorities, from the *Year Books* down to the present day, uniformly establish and fortify this doctrine, that where courts of special and limited jurisdiction exceed their rightful powers, the whole proceeding is *coram non judice*, and all concerned in such void proceedings are liable to an action by the party injured. (*Case of Marshalsea*, 10 Co. 68. *Terry v. Huntingdon*, Hardr. 480) But in the case of *Miller v. Seare*, (2 Bl. Rep. 1141,) Lord Chief Justice *De Grey* said "that the judges of the courts of general jurisdiction were not liable to answer personally for their errors in judgment. The protection as to them is absolute and universal; with respect to the inferior courts, it is only while they act within their jurisdiction."

In support of this doctrine, I refer generally to *Book of Assise*, 27 Edw. III. pl. 15. 9 Hen. VI. 60. pl. 9. 9 Edw. IV. 3. pl. 10. *Floyd and Barker*, 12 Co. 23. *Aire v. Sedgwick*, 2 Roll. Rep. 199. *Hammond v. Howell*, 1 Mod. 184. *Groenvelt v. Burnwell*, 12 Mod. 286. 1 Salk. 396. 1 Ld. Raym. 454. *Miller v. Seare*, 2 Bl. Rep. 1145. *Mostyn v. Fabrigas*, Cowp. 172.

This rule has been invariably acknowledged as law in this state; (2 *Caines' Rep.* 312;) and has been recognised and supported by our sister states. In the case of *Phelps v. Sill*, in the Supreme Court of *Connecticut*, (1 *Day's Cases in Error*, 315,) a suit was brought against a judge of probate, for omitting to take security from a guardian, and the court held that the action would not lie. They said; "It is a settled principle that a judge is not to be questioned in a civil suit for doing, or for neglecting or refusing to do, a particular official act, in the exercise of judicial power."

In the case of *Lining v. Bentham*, in the Supreme Court of *South Carolina*, (2 *Bay's Rep.* 1,) in 1796, it was unanimously decided *that a justice of the peace may commit for a contempt; that his warrant of commitment under his hand and seal was the best evidence of the contempt; and that he was not liable to an action for what he did in his judicial capacity, though he was subject to indictment if he acted oppressively.

The same court, in 1796, in *Brodie v. Rutledge*, (2 *Bay's Rep.* 69,) held that it was a well-settled rule of law, that no suit would lie against a judge, for any judgment rendered by him in his judicial character; though liable to impeachment.

Our statute is a transcript from the *English habeas corpus* act, and Serjeant *Hawkins*, in his learned exposition of that statute, (*Hawk.* b. 2. c. 15. s. 24,) says, "the *habeas corpus* act makes the judges liable to an action at the suit of the party in one case only, viz. in refusing to award a *habeas corpus*; and seems to leave it to their discretion, in all other cases, to pursue the directions of the act in the same manner as they ought to execute all other laws, without making them subject

to the action of the party, or to any other express penalty or forfeiture."

The fifth section gives a penalty against "*any person* who shall knowingly, contrary to this act, recommit or imprison for the same offence, or pretended offence, any person so set at large," &c.

I consider this section as having no application to the *chancellor*, or *judges*, in their judicial character. This penalty applies only to magistrates and others who act *ministerially* as conservators of the peace, or who commit for trial, or to answer indictments.

If the penalty for recommitting applies to the chancellor, while sitting as a court of chancery, it must equally apply to all the judges of the Supreme Court sitting together in term; and if the penalty be incurred by the Supreme Court, composed of five judges, how are they to be sued, jointly or severally? If the judges, or a majority of them, are liable to be sued as a court, before what tribunal are they to be sued? If in the Courts of Common Pleas, do the parties lose the benefit of a writ of error to the Supreme Court? Or are the judges to sit in judgment on themselves? These absurd consequences evince that, *as courts*, they were never intended to be made responsible to the party in a private suit. Consider them liable in their ministerial capacity only, and the construction of this statute accords with the established and revered principles of the common law.

The authorities cited show the general reason and policy of the **law* in maintaining *judicial inviolability*; and surely we ought not to adopt a construction of this statute abhorrent to every principle of justice and sound policy, unless that interpretation be imperiously required by the express and unequivocal terms of the statute. In this case the defendant acted in his judicial character, "as chancellor, and not otherwise." There is no pretence that he acted from corrupt motives; on the contrary, it is expressly admitted that his intentions were pure.

That a chancellor or judge of the Supreme Court shall be compelled to decide new and difficult questions of law or equity, at the peril of incurring a severe penalty, if they happen to decide wrong; that pure intentions and honest endeavors to perform their official duties shall afford them no protection, are propositions repugnant to reason and humanity, and cannot be law.

The *habeas corpus* act is justly prized as one of the bulwarks of freedom, and can be endangered only by its *misapplication* and *abuse*. Let us beware, that in our zeal for securing personal liberty, we do not destroy the virtuous independence and rightful authority of our courts of justice, and thereby subvert the foundations of social order.

So long as our courts are *pure, enlightened* and *independent*, we shall enjoy that greatest of earthly blessings, *a government of laws*; but whenever these tribunals shall cease to deserve that

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character, the standard of justice and civil liberty must give place to the sceptre of a tyrant.

My opinion is, that the judgment of the Supreme Court ought to be affirmed.

PARIS, Senator, concurred.

BRETT, BRUYN, HAIGHT, HALL, HOPKINS, HUMPHREYS, MARTIN, PHELPS, STEARNES, WHITE and WILLIAMS, Senators, were also of opinion that the judgment of the Supreme Court ought to be *affirmed*, but did not state their reasons.

CLINTON, Senator. Great pains and much argument have been employed by the counsel for the defendant, to overthrow a decision made by this court at the last session, and to demonstrate, not only that the conclusions, but the reasoning adopted on that occasion, were untenable and fallacious. Although this course is unprecedented and totally unwarranted, yet the patience of the *court was yielded without reluctance to a protracted discussion, which terminated in establishing what was never questioned: that the Court of Chancery, as well as every other court, has a right to punish contempts, and to apply the rod of chastisement to the conduct of its officers. But that chancery has the power of punishing for crimes; that a violation of a statute is not a misdemeanor, and that judicial responsibility is to ride over the rights of the people, and the constitution of the land, are positions which yet remain totally unestablished. Although I am willing to yield every tribute of applause to the erudition and ingenuity of the counsel employed for the defendant, yet I cannot concede that they have succeeded in overturning the decision of this tribunal. If I could conceive it relevant to the discussion to enter into a defence of the judgment of the court, I should not consider it attended with any difficulty to present a complete vindication; but a measure of this kind would be an admission that a court might, at any time, and at all times, review its own decisions, or the decisions of its predecessors, and pronounce the law to be different, at different periods and on different occasions, thereby entirely destroying the authority of precedent, converting the judge into the legislator, and reducing us to a situation where we might truly say, "*Misera est servitus ubi jus est aut vagum aut incognitum.*" In the case of *Hartshorne and others v. Slight*, (3 Johns. Rep. 562,) it was insinuated, with a view of obtaining the benefit of a second writ of error, that courts might and ought to review their decisions. On that occasion, I thought it my duty to resist a doctrine which I then considered, and still do consider, as of the most pernicious tendency; and I animadverted upon it in the following words: "This cause is now before us, and it does not avail the plaintiff in error to say that courts may and ought to review their own decisions. This court will hardly admit that doctrine. A motion for a re-hearing after judgment has never been made or sustained, when a cause has been once settled. When a decision has been pronounced here, the law is established; and no power can change it but the legislature. The rule becomes bind-

ing, not only upon all subordinate tribunals, but upon this court."

A contrary determination would involve not only the greatest absurdities, but the greatest mischiefs. Inferior tribunals would be without chart or compass; the authority of decisions would be *done away, and one fourth of the senators of this court changing every year, adjudications would fluctuate with the mutations of members. What was law yesterday, would not be law to-day. It has never been known, at least in a court of *dernier resort*, that its decisions have been altered or revised in any other way than by the legislative power; and even in courts not of *dernier resort*, if a different course has been, at any time, pursued, it has been remarked as a singularity. And when Lord *Kenyon* attempted to question the authority of an adjudication of his predecessor, it was considered as an anomaly, not as a rule in the conduct of judicial tribunals. *Stare decisis et non quieta movere*, is a maxim justly held in the highest veneration.

Admitting, then, the authority of the adjudication of last session, we have next to inquire into its bearing upon this cause. The present suit is brought to recover a penalty under the fifth section of the *habeas corpus* act, which is in the following words: "And be it further enacted, that no person, who shall be set at large upon any *habeas corpus*, shall be again imprisoned for the same offence, unless by the legal order or process of the court, or other court having jurisdiction of the cause. And if any person shall knowingly, contrary to this act, recommit or imprison, or cause to be recommitted or imprisoned, for the same offence or pretended offence, any person so set at large, or shall knowingly aid or assist therein, he shall forfeit to the party aggrieved 1,250 dollars, any colorable pretence or variation in the warrant of commitment notwithstanding."

The decision of last session was on a writ of error, brought on a judgment on a *habeas corpus*. It appeared that the plaintiff in this cause was committed by the chancellor. That he was discharged by a judge, in vacation, under the *habeas corpus* act; re-imprisoned by the chancellor, after such discharge; and that, finally, the case was brought before the Supreme Court, in which three of the five judges decided in favor of the legality of the imprisonment; and that this court reversed that decision, considering the original imprisonment unjustifiable, and, of course, the incarcerations as aggravations of first wrong.

It is not, then, to be wondered at, that the counsel for the defendant should have pointed their principal attack at that decision of this tribunal. If that adjudication was right, it is difficult to conceive how the defendant can escape from the penalty of the statute; and there can, indeed, be no door of retreat, unless we *suppose, that it was founded exclusively on the illegality of the original commitment, and on the judgment of the Supreme Court, without any reference to the proceedings under the *habeas corpus* act, or unless we take the broad

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ground of judicial irresponsibility, or the more narrow ground of the inapplicability of the statutory prohibition to courts in general, especially to the court in question. On the supposition that our decision cannot be questioned, denied, or explained away, as to its general result, these are the only three points which can be brought to bear in favor of the defence.

As to the first point, it is explicitly denied that the decision was not in part bottomed on the proceedings under the *habeas corpus* act. The only opinion delivered in coincidence with the judgment of the court, took notice at large of that branch of the subject and considered a judge in vacation a competent tribunal in such case ; his discharge as final and conclusive, and a reimprisonment, after that discharge, as an infraction of the statute. It would, therefore, in strictness, not be necessary to revive this discussion, but as it has been much labored, I shall bestow a few remarks upon it.

It appears obvious to me, that the *habeas corpus* act was intended to invest the same power in a judge in vacation that the Supreme Court has in term. The same limitations of power that controlled their proceedings at common law were applied to the judge under the statute ; and as he is, in this respect, a creature of the statute, it became necessary to define the power in the act communicating it. The common law restrictions upon the power of the court were imposed upon that of the judge ; and if he cannot take cognisance of other commitments than for crimes, if he cannot meddle with convictions whether legal or illegal, they are equally restrained ; and, perhaps, there is only one case in which the court will interfere in favor of a prisoner in which a judge will not, and that is in case of dangerous sickness, when the laws of humanity require their interposition ; and in a situation like this, the common law, in a spirit of benevolence, has planted no check against judicial discretion.

If the power of the judge is only limited to commitments for crimes, as has been zealously contended for by the defendant, it would not bear him out in this case, because the conviction was for a crime, and therein principally consisted its illegality ; but this construction is not only in the teeth of existing practice, but *in the face of the statute. It cannot be denied but that the power of the judge, or commissioner, is commensurate with all unjust imprisonment, except in treason and felony, and this has been the invariable understanding, and undisputed practice, until the agitation of this cause has elicited new and extraordinary doctrines. The object of the statute would be greatly frustrated, if a judge has no right to take notice of illegal convictions ; if he is confined to crimes only, what remedy is there for all illegal imprisonments in other respects ? Must the injured party wait until the sitting of the Supreme Court ? And will damages to any extent, in an action for a false imprisonment, atone for a violation of feeling, and personal liberty, and an infraction of the great rights which distinguish a free man from a slave ? Suppose a child is torn from his pa

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rent, a wife from her husband, a citizen from his habitation, and placed in close confinement, is there no court of summary jurisdiction authorized to grant relief? Is he to be told that he must wait until the Supreme Court convenes, which may be in not less than three months? And are we to suppose that our law would be silent on a point of so great and of such obvious importance? But the law is not silent; it arms the judge with power over all persons imprisoned; whereas that of *Great Britain* is confined to crimes. Because the two statutes vary in that important respect, and because ours has not a preamble like that of the *British* statute, and because in the last edition of the revised laws, a preamble was struck out, it is maintained that they are similar, or, in plain *English*, that they are alike, although they differ.

At the last session, it was earnestly contended not only by the bar, but by some of the bench, that as long as the conviction was not quashed or reversed, no court or judge could grant relief by *habeas corpus*. But the leading case of *Bushell*, in C. B. and a train of decisions founded upon it, which were produced and relied on, seem to have imposed silence on this head. But it is now asserted that a judge is restrained from interfering with any *conviction* whatsoever, on account of the words "other than persons convict, or in execution by legal process." A commitment in consequence of a conviction is an execution. If a judge has a right to take cognisance of an illegal execution, he has, of course, a right to notice the case of a person convict, because the execution is bottomed on the conviction, and the words *by legal process*, refer not only to the legality of the execution, but to the legality of the conviction. Where the execution is not legal, the judge may relieve. Why not, then, where the conviction is illegal? The conviction does not incarcerate; it is the *mittimus* emanating from the conviction; and in the case before us, the relief granted was on the attachment, which was the execution confining the prisoner. That the statute authorizes the judge to interfere in cases of execution, other than executions by legal process, cannot be questioned, nor is it attempted to be denied. But how many cases can be shown where the judges have relieved in this summary way? Some have been particularly referred to. Those of *Benedict Lewis* and *Hannah Clapp*, fell under the cognisance of the *Chief Justice*, in which he very properly and efficiently extended relief. The judge is unquestionably constituted a tribunal to examine the legality of the conviction and the execution. If they are according to law, he is restrained from interfering; but if they are, in his opinion, illegal, then he may relieve the prisoner; and this being the case, it is immaterial whether his decision is correct or not, as it respects the power of chancery, or any other tribunal or person, to reimprison, except the court that has power to try the cause.

But it is maintained that admitting the illegality of the imprisonment, yet the chancellor, acting as a court, is irresponsi-

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ble, particularly to private prosecution or indictments ; and a variety of learning and not a little declamation, have been displayed in support of this position.

The *Chief Justice*, in his elaborate opinion, has exhausted all that can be said on this subject ; and in noticing it, I shall certainly treat him with all the respect, so justly due to his high station and eminent talents. Whether he has travelled out of the usual routine of judicial conduct, to support a cause which was not then debated by the plaintiff, is not a material point for inquiry, because, in giving an opinion he had undoubtedly a right to assign his reasons at large ; and because we have every reason to believe he considered it his duty to vindicate judicial irresponsibility to its full extent, from a sincere conviction that it is connected with the due administration of justice, and with the best interests of the country.

Where a judge acts within his jurisdiction, it would entirely destroy his independence and his usefulness, if he were liable to answer to individuals who might conceive themselves aggrieved by his decisions. It is the lot of humanity to err, and what man would take an office, which would expose him, in the execution of *its duties, to the prosecutions of unfortunate or dissatisfied suitors ? No judge would be able to stand up against the expense and vexation that would result from this position ; and it is no less unjust than impolitic, to expose him to amenability for errors, to which we are more or less subject. This is the true principle and the true reason, why judges, acting as judges, that is, acting within the sphere of their delegated authority, are protected in *England*. It is true that a judge is held to be responsible to the king. The king being the fountain of honor and justice, and the judges being the delegated ministers of the judicial power, it is presumed that they ought to answer to him only, as their principal and constituent. But this can never be applicable here ; and, in *England*, it cannot apply to cases where the judge has no jurisdiction.

The case of *Miller v. Seare* (2 Bl. Rep. 1141) was an action of false imprisonment, brought against three commissioners of bankruptcy. Ch. J. *De Grey* decided that the commissioners had no power to commit, and were, therefore, liable. In giving the opinion of the court, he took occasion to say “ that the judges, in the king’s superior courts of justice, are not liable to answer personally for their errors in judgment ; and this, not so much for the sake of the judges, as of the suitors themselves.” “ In courts of special and limited jurisdiction, having power to hear and determine, a distinction must be made. While acting within the line of their authority, they are protected as to errors in judgment ; otherwise they are not. So, in Dr. *Bonham’s case*, false imprisonment lay, because they had exceeded their authority. In Dr. *Groenvelt’s case* it did not lie, because they were within their jurisdiction. In Dr. *Bourchier’s case*, and the case of *Terry and Huntingdon*, in *Hardres*, it lay, because of the excess of jurisdiction.” “ In

all cases (continues Ch. J. *De Grey*) where protection is given to the judge giving an erroneous judgment, he must be acting *as judge*. The protection in regard to the superior courts is absolute and universal; with respect to the inferior, it is only while they act within their jurisdiction." This is the authority principally relied on, and it will be at once perceived on how slight a foundation. It was a mere *obiter* opinion, not applicable to the case before the court; but if critically examined, it is susceptible of a construction, not incompatible with truth. The maxim of Ch. J. *De Grey* is, that in order to extend protection to the judge giving an erroneous judgment, he must be acting *as judge*. Now can a *man be said to act as a judge, when he has no jurisdiction? Will the mere forms or symbols of office, the mere occupation of a judicial bench, constitute a judge? Suppose the *Chief Justice* were to go into his court, and declare himself possessed of chancery powers, and commit a man for not answering a bill in chancery, and should be attended by his clerk and officers of justice, and open his court with his usual formalities, would any man have the hardihood to say that this pageantry and assumption would protect him from amenability? Unless it can be supposed that the superior courts in *England* and this country, have jurisdiction coextensive with every object of judicial cognisance, then we must admit that their jurisdiction is not unlimited, and that, consequently, they may act beyond it, and ought to answer for it. Their jurisdiction is unlimited as to place, but not as to the quantity of judicial power. The process of chancery and the Supreme Court, runs into every county of the state; but their authority does not reach every mode of action, every source of litigation. And, therefore, to say that those courts shall be protected in all cases, whether they act within their jurisdiction or not, and that inferior courts shall only be shielded when they act within their jurisdiction, is establishing a difference without a reason, and is investing the higher courts with arbitrary and discretionary power, over the lives, and liberties, and property of our citizens. The case of *Hammond v. Howell, Recorder of London*, (2 Mod. 219,) was an action brought against the latter, as commissioner of *oyer and terminer*, for fining and imprisoning a juror on account of a verdict. The court held that an action would not lie against a judge for what he does judicially, though erroneously; that the *Old Bailey* had jurisdiction of the cause, and might try it; and had power to punish a misdemeanor in the jury; and that, although the recorder acted wrong, yet, as he acted judicially, he was not liable. This, although carrying the principle of immunity to its utmost latitude, and although probably misapplied, yet may be considered as intended to come within the general rule of the necessity of jurisdiction, in order to furnish protection. In the celebrated case of the *Marshalsea*, (10 Co. 69. 76,) the doctrine of Ch. J. *De Grey* is contradicted, for "it was resolved that the action well lies against the defendants; and a difference was taken when a court has jurisdiction of the cause,

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and proceeds *inverso ordine*, or erroneously, there the party who sues, or the officer or minister of the court, who executes the *precept or process of the court, no action lies against them." But when the court has not jurisdiction of the cause, there the whole proceeding is *coram non judice*, and actions will lie against them without any regard to the precept or process, and, therefore, the rule cited by the other side, "*Qui jussu judicis aliquod fecerit* (but when he has no jurisdiction *non est judex*) *non videtur dolo malo fecisse quia parere necesse est*, was well allowed, but it is not of necessity to obey him, who is not judge of the cause, no more than it is a mere stranger, for the rule is *judicium a non suo judice datum nullius est momenti*; and that fully appears in our books; and, therefore, in the case betwixt *Bowser* and *Collins*, in 22 *Edw. IV.* 33, c. there *Pigot* says, if the court has not power and authority, then their proceedings is *coram non judice*. As if the Court of Common Pleas holds plea in an appeal of death, robbery, or any other appeal, and the defendant is attainted, it is *coram non judice, quod omnes concesserant*." I hope it will not be contended that a ministerial officer, obeying the orders of his superiors, is liable, when the persons giving them are not. The rule in such cases is, that "where the subject matter of any suit is not within the jurisdiction of the court applied to for redress, every thing done is absolutely void, and the officer executing the process is a trespasser. But where the subject matter is within the jurisdiction of the court, but the want of jurisdiction is to the person or place, unless the want of jurisdiction appears on the process to the officer who executes, he is not a trespasser." (*Esp. Dig.* 391.) The Court of Common Pleas is a superior court of general jurisdiction, and yet it is, in the case of the *Marshalsea*, explicitly asserted, that an appeal of death, robbery, or any other appeal, would be *coram non judice*, and void; and as has been justly observed, that if a judgment given by a judge is void, the correlative is true that it is not given judicially, and if it is pronounced by a man bearing the office of a judge, yet, if it is rendered *coram non judice*, it is of no more force or consideration, than if given by a person who is not a judge.

The *Chief Justice* has triumphantly quoted Serjeant *Hawkins* on this subject, but he has inadvertently omitted a very material part. The whole section is as follows: "And as the law has exempted jurors from the danger of incurring any punishment in respect to their verdict in criminal causes, it hath also freed the judges of all courts of record from all prosecutions whatsoever, except in the parliament, for any thing done by them openly in *such court as judges; for the authority of a government cannot be maintained, unless the greatest credit be given to those, who are so highly intrusted in the administration of public justice; and it would be impossible for them to keep up in the people that veneration of their persons, and submission to their judgments, without which it is impossible to execute the laws with vigor and success," (thus far the 358

Chief Justice has quoted, but *Hawkins* proceeds,) “if they should be continually exposed to the prosecutions of those whose partiality to their own causes would induce them to think themselves injured; yet if a judge will so far forget the honor and dignity of his post, as to turn solicitor in a cause which he is to judge, and privately and extrajudicially tamper with witnesses, or labor jurors, he hath no reason to complain, if he be dealt with according to the capacity to which he so basely degrades himself.”

The last part of the sentence, which the *Chief Justice* omitted, is very material, because it contains a qualification of the general rule. It is admitted on all hands, with *Hawkins*, that for errors committed by a judge, *quatenus* a judge, he is not responsible, but it is equally contended, and *Hawkins* agrees in the doctrine, that if he acts extrajudicially, he is then responsible. Indeed, *Hawkins* carries it beyond the jurisdiction, for he intimates that if a judge acts out of character, “he will be dealt with according to the same capacity, to which he so basely degrades himself.” Our constitution renders a judge liable to impeachment for male and corrupt conduct in office. And the punishment does not extend further than to removal from office, and disqualification to hold any place of honor, trust or profit; but the party so convicted is, nevertheless, liable and subject to indictment, trial, judgment and punishment according to the laws of the land. The male and corrupt conduct cannot be ascribed to any error of the understanding, or to any misconduct, however gross or oppressive, or however injurious to individuals, unless it is attended by bad and corrupt motives. The *malus animus* is difficult, at all times, to establish; and there is no cause, be it ever so desperate, no conduct, be it ever so abandoned, but it may find not only advocates, but advocates who can advance plausible arguments, and who can gild over high-handed acts of oppression, with declamatory appeals in favor of judicial independence and official dignity. It will, therefore, be a rare instance to bring proof sufficiently clear against a judge, in order to produce *his removal. Impeachment is not only difficult to institute and hard to establish, but, when effected, what good does it do to the injured party? Does the removal of an unjust judge remunerate him for imprisonment, for multiplied vexations and accumulated expenses. The protection furnished to a court, is commensurate with its jurisdiction; for where jurisdiction ends, the judge also ceases to be a judge, and is not entitled to the immunities and rights of one. This is the recorded opinion of the defendant, delivered in the incipient stages of this affair. “Upon my judicially determining (says the chancellor) that the interference of a single judge, to obstruct the process, and impede the justice of this court, was unwarranted, that his proceedings were *coram non judice*, it followed, as a necessary consequence, that his reiterating his interference, might or might not, according to circumstances, be imputed to him as a contempt of this court; for though a judge acting

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in the sphere of his jurisdiction, cannot, unless actuated by corrupt motives, be impeached or questioned, it is otherwise where such jurisdiction does not exist; he is then exposed to be treated as a contemner of the court, with whose process he interferes." (See printed case, *Ex parte Yates*, p. 105.) Here we have the authority of the chancellor himself, that when a judge of one of the highest tribunals exceeds his jurisdiction, and trespasses upon that of a co-ordinate tribunal, he may be punished for a contempt; and if liable in that way, he must surely be responsible in a civil suit, to the party aggrieved; and here let me add, that it comes with a very ill grace from superior tribunals, to say that whether they act within or without their jurisdiction, they are equally protected from accountability, but inferior courts must take care and keep within their jurisdiction, for although their knowledge of the law is not so extensive as that of the other courts, yet their ignorance shall be no excuse, and although they require a more extensive, yet they shall receive a more limited protection. And let me further add, that this doctrine is not only unreasonable in itself, repugnant to law and common sense, but it is contrary to the principles of our government. The principle of responsibility pervades every department of a free government; for wherever responsibility ends tyranny begins. That a judge may fine and imprison, and punish *ad libitum*; and whether he acts according to law or not, he cannot be reached by suit or indictment, is, in fact, saying that he may act the tyrant at pleasure. No man in the community is safe, if the judges who advocate such monstrous doctrines are, *which I can never believe, prepared to exhibit their practical operation, unless they are effectually checked and controlled by this high tribunal. The institution of an impeachment, as I before stated, is difficult. An accusation requires the sanction of two-thirds of the assembly, and a conviction that of two thirds of this court, and the punishment neither furnishes any remedy to the injured party, nor does it extend to any personal penalties. How difficult must it be, then, to convict a tyrannical judge, especially under the *ægis* of mental error, and under the *Telamonian* shield of judicial irresponsibility? Our constitution contemplates an impeachment for *male and corrupt conduct in office*, for acts done as a judge; and whether considering the extraordinary evasions that have been practised, a party complained against, in a case like the present, might not say in his defence, that the facts alleged being extrajudicial, he is not liable as for official conduct, is a point which time alone can determine. I can, therefore, never subscribe to the doctrine of unaccountability in the higher courts. The true distinction has been very judiciously pointed out in the course of this discussion. An inferior court shall, when questioned, show that it acted within its jurisdiction. Whereas in courts of general jurisdiction, jurisdiction is presumed until the contrary is shown.

The only remaining question is, whether the chancellor acted

within his jurisdiction. If his interference was prohibited by the statute, it clearly follows that his proceedings were *coram non judice*, and that he is liable in the same way as any other individual.

It is contended, first, that the statutory inhibition does not extend to courts; secondly, that if it does, yet that this case falls within one of the exceptions.

As to the first point, the words of the act are, "That if any person shall knowingly, contrary to this act, recommit or imprison, or cause to be recommitted or imprisoned, for the same offence or pretended offence, any person so set at large, or shall knowingly aid or assist therein, he shall forfeit to the party aggrieved 1,250 dollars, any colorable pretence or variation in the warrant of commitment notwithstanding."

To ascertain the meaning of this provision, and to identify the persons obnoxious to the penalty, it is necessary to observe, that, in the preceding section of the statute, there is an express infliction of the same penalty upon the chancellor and judges of the Supreme Court, for denying to allow the writ of *habeas corpus*; *and as the denial of the writ, in cases where it ought to be granted, is no greater injury to the individual than recommitting him for the same offence, where it has been granted and he has been set at large by competent authority, it is to be presumed that for similar injuries similar remedies would be provided, and that for similar offences, the same penalties would be prescribed. Indeed, the imposing a penalty on a judicial officer, for denying the writ of *habeas corpus*, is much more severe than the infliction of a penalty for knowingly recommitting a person set at large on a *habeas corpus*. It is sufficient, however, to show that the legislature intended to guard the liberty of the citizen, by holding these penalties over the heads of the ministers of justice. As the fourth section specifies the chancellor and judges of the Supreme Court, and the fifth refers to any person who shall knowingly recommit or imprison, it has been asked, why this phraseology was adopted, if it was intended to apply the penalty to the chancellor and judges in both cases? The answer is obvious. By the act, the chancellor and judges only have the power of granting a *habeas corpus*; but the persons having the power to imprison are as numerous as the magistrates and courts in the state. In the one case, there was no difficulty of specification; in the other, a general description was indispensable. But why should courts be protected more than other persons? Is it not their bounden duty to protect the liberties of the citizen? Is this not one of the great ends of their institution? And if they violate the duties which they owe to the state, if they defeat the object of their establishment, why should their judicial character protect them? The phraseology of the statute evidently refers to courts. *Recommitment* implies *commitment*, which is a judicial act: *Any colorable pretence or variation in the warrant of commitment notwithstanding*, certainly intends a judicial act, and was meant to guard against

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evasions of the provision by varying the apparent grounds of proceeding. Indeed, the principle contended for has not a shadow of support. If the chancellor is protected on the ground of his being a court, so is every justice of the peace, and every inferior tribunal, and thus the statute would be a perfect dead letter. Here, let me further remark, that wherever a judge usurps a jurisdiction, the act he does is not a judicial act, however it may appear, but the act of an individual, though on either hypothesis the penalty would reach him.

As to the second point, it is said by the *Chief Justice*, "the *statute allows the party so discharged to be again imprisoned for the same offence, provided it be by the legal order or process of the court wherein he is bound by recognisance to appear, or other court having jurisdiction of the cause. Any court which has jurisdiction of the subject matter may reimprison, notwithstanding the discharge."

The *British* statute directs a recognisance to be taken for the appearance of the prisoner in the B. R. or in such other court where the offence is properly cognisable. Our statute says generally, at the next court where the offence is properly cognisable, as the case should require. The right of reimprisonment, then, exists only in the court where he is recognised to appear, or in the court having jurisdiction of the cause; evidently meaning, that if he is bound to appear at one of our criminal courts, say the General Sessions, and is tried and found guilty there, he may be reimprisoned, or if he is bound to appear at the General Sessions, and is found guilty at a court of *oyer and terminer*, a court having jurisdiction of the cause, he may also be imprisoned. But here a latitudinal construction is adopted which will entirely nullify the statute. Any court having jurisdiction of the subject matter has jurisdiction of the cause, and may reimprison, says the *Chief Justice*. The chancellor has jurisdiction in contempts; the plaintiff was committed for a contempt; therefore he had jurisdiction of the subject matter; and having jurisdiction of the subject matter, he had jurisdiction of the cause, and had a right to reimprison. Unfortunately, this conclusion is founded upon a gratuitous assumption of facts, and upon the most commonplace sophism. In the first place, it is denied that the plaintiff was committed for a contempt only. He was committed for a misdemeanor; 2d. On every concession, the commitment was for a misdemeanor and a contempt blended together, and so far as the misdemeanor entered into the cause of commitment, he had no jurisdiction; and, therefore, he had not complete jurisdiction of the cause, but acted under a usurped character; 3d. Having jurisdiction of the subject matter does not necessarily imply having jurisdiction of the cause. If a power to commit for crimes generally, which is a jurisdiction over the subject matter, involves a power to recommit in a case wherein a prisoner is discharged under the *habeas corpus* act, then this great charter of our liberties, this boasted palladium of personal security, is a mockery and imposture. In the cases

of *Benedict Lewis* and *Hannah Clapp*, *discharged by the *Chief Justice* under the *habeas corpus* act, the magistrates of the city of *Albany*, who had committed them to prison, had jurisdiction of the subject matter, by the "act for apprehending and punishing disorderly persons;" now, if having jurisdiction of the subject matter invested them with the right of reimprisonment, of what use or validity was the discharge of the *Chief Justice*? Of what benefit is the *habeas corpus* act against encroachments of a tyrannical judge? Will not the construction of the *Chief Justice* effectually protect him against the penalties of the statute, and leave personal liberty in the same state of insecurity as it was before the statute was passed? Having jurisdiction over the subject matter does not, therefore, give the judge jurisdiction of the cause. *The subject matter is the crime in the abstract. The cause is the case of the individual.* In the case of *Groenvelt v. Burnwell*, and other censors of the college of physicians, this distinction was well remarked by Lord Chief Justice *Holt*. "Here," said he, "the *subject matter* and the *person* are under the jurisdiction of the censors." The concurrence of both gave them jurisdiction of the cause, and protected them from amenability; but if the *person* had not been within their jurisdiction as well as the *subject matter*, then they would have been liable. After the discharge by the judge, the chancellor had no jurisdiction over the case of the plaintiff, even if he had it in the first instance, and, therefore, he had no power of reimprisonment. Jurisdiction of a cause intends the power of trying it; and will any construction invest the chancellor with this right in the present case? It appears to me that nothing can be more clear. The whole superstructure of sophistry is built upon the sandy foundation of a *petitio principii*, and respecting, as I do, the talents and erudition of its author, I cannot but say, on this occasion, "*Neque semper arcum tendit Apollo.*"

It is with not a little regret that I have seen the commencement and the progress of this controversy. Considering it as a dispute between two individuals, it dwindles into insignificance; but, in most of its stages, it has become a controversy between power and right, and between judicial tyranny and the liberty of the citizen. In this point of view, it has assumed an importance proportioned to the value of the objects which it embraces; and let not the unhallowed tongue of malignity insinuate, that the decision of this court, if against the judgment of the Supreme Court, will operate as a protection to malepractice, extortion and misdemeanors.

If the plaintiff is guilty, he is still liable to punishment; but *whether guilty, or innocent, he ought to be legally proceeded against. This is a right which the most abandoned criminal has equally with the best citizen. But what is the true state of the case? The plaintiff, in common with many other masters in chancery, had filed bills and carried on equity suits, in the name of another solicitor. Complaint was made against him by a client. The solicitor, although he had received a fee

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for permitting another solicitor to be substituted, declared it was all done without his consent. The party was excluded from the benefit of a purgation on oath, according to the general, and, I may say, invariable course of chancery; and he was committed to prison, without limitation of time. If his oath had been received in explanation, it would have been at least equal to the panic-struck testimony of the principal witness against him. A commitment for the first offence, under these circumstances, was, to say the least, a very harsh, a very unnecessary, and a very unprecedented measure; and in this case, it might be truly said, *jus summum saepe summa est malitia*, (*Terence*.) But the proceeding being on the very face of it for a crime, and, consequently, illegal, he was discharged on a *habeas corpus*. Here, in all reason, and according to all law, the business ought to have been arrested. But Mr. Yates was recommitted, in defiance of this great bulwark against tyranny, and then the transaction assumed a new, interesting and extraordinary aspect. It was no longer the case of an injured individual. It became the case of every member in the community; and among the novel and extraordinary doctrines which this controversy has elicited, we are at length told, with judicial solemnity, that a judge of the Supreme Court, or the chancellor, acting as such, are beyond the reach of prosecution or indictment, whether they act with or without jurisdiction, and be their conduct ever so illegal or oppressive. To these doctrines I can never subscribe. And I consider the decision of this day as extending beyond the remuneration or punishment of individuals; that it will, in all its bearings and aspects, decide whether ministers of justice may oppress with impunity! Whether the *habeas corpus* act shall any longer dispense its blessings, and whether the law shall bend to the judge, or the judge bend to the majesty of the law.

BLOODGOOD, GILBERT, SELDEN and SMALLY, Senators, were also of opinion that the judgment of the Supreme Court ought to be reversed.

YATES and TOWNSEND, Senators, gave no opinion.

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* April 6th,
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firming, 14.
For reversing,
5.

(a) Vide Yates
v. Lansing, 5
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282. Yates v.
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*A majority of the court being of opinion that the judgment of the Supreme Court ought to be affirmed, it was, thereupon,

ORDERED and ADJUDGED, that the judgment given in the Supreme Court be affirmed, and the record remitted, &c. and that the plaintiff in error pay to the defendant his double costs to be taxed, &c. Judgment affirmed.* (a)

ROBERT WILSON AND OTHERS, Appellants,
against

SARAH HAMILTON AND OTHERS, Respondents.

If any of the
parties in in-
terest in a
cause, become

HENRY, for the respondents, presented a petition of one of the respondents, stating that one of the respondents, a *feme sole*, had married, and that one of the respondents and

one of the appellants had died, since the appeal was filed in this cause ; and he moved that the appellants bring in the proper parties, in a reasonable time, and proceed on the appeal, or that the proceedings here be suspended. (5 *Ves.* jun. 305. *Byne v. Potter.*)

Van Vechten and *T. A. Emmet*, contra.

Per Curiam. Here is a change of parties in interest, pending the appeal ; and as all the parties in interest are not now before the court, we cannot pronounce a decree which will embrace the whole matter in litigation, and put a final end to the controversy. It is an established principle of a court of equity not to decree finally until all the proper parties are before the court. As this court does not possess original jurisdiction, so as to award process to bring in the parties whose interest has accrued since the appeal was filed, the cause ought to be remanded without prejudice to either party.

The following order was thereupon made :

On the petition of *Isaac Hamilton*, one of the respondents, stating that one of the respondents, a *feme sole*, had married, and one of the respondents and one of the appellants had died, pending the appeal ; and on motion of Mr. *Henry*, counsel for the petitioner, and to the end that the proper steps may be taken in the court below, to call in the parties whose interests have accrued by the marriage and deaths of the parties aforesaid ; ORDERED that the said cause be remanded, without costs.

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changed, by death or otherwise, pending an appeal in this court, the cause will be remanded, without prejudice to either party, in order that the court below may take the necessary steps to bring in the parties, whose

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interest may have accrued since the appeal. (a)

(a) Vide *Sands v. Codwise*, 2 *Johns Rep.* 487.

*JESSE BUEL AND OTHERS, Appellants,
against

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RANDALL S. STREET AND OTHERS, Respondents.

THE respondents filed their bill in the Court of Chancery on the 1st of *June*, 1811, against the appellants. It appeared from the bill that the appellants were appointed commissioners, by the act of the legislature, passed the 22d of *March*, 1811, incorporating the stockholders of the *Middle District Bank*, for the purpose of opening books, on the first *Tuesday* of *May*, 1811, in *Poughkeepsie* and *Kingston*, for the subscription of shares to the bank, at twenty-five dollars each ; 2 1-2 *per cent.* on each share to be deposited at the time of subscription, and the whole number of shares not to exceed 20,000, exclusive of such as might be subscribed by the state ; if more than that number of shares was subscribed, the excess was to be apportioned among the subscribers. The appellants were also appointed inspectors of the first election of directors. While the book was opened at *Poughkeepsie*, the respondents subscribed, and paid, at the same time, two and a half *per cent.* on each share, by them subscribed respectively. *Buel* and some others of the appellants were the commissioners for opening the book at *Kingston*. The bill further stated that *Buel*, on the afternoon of the 24th of *March*, 1811, took possession of the subscription book, and kept it in his exclusive posses-

No appeal lies to this court, from an order of the Court of Chancery for an attachment to bring up a party to answer interrogatories, for a contempt, in disobeying a writ of injunction, issued in a cause. It seems that an appeal will not lie from any interlocutory order which does not involve a decision upon some matter, touching the merits of a cause, and by which the party is aggrieved. (a)

(a) Vide *Sands v. Hildreth*, 12 *Johns Rep.* 493. Tra

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vis v. Waters,
12 Johns. Rep.
500. Eastburn
v. Kirk, 2
Johns. Ch. Rep.
317. Atkinson
v. Manks, 1
Cowen, 691.
Reid v Van-
derheyden, 5
Cowen, 719.
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Disbrow v.
Henshaw, 8
Cowen, 349.
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ton Bank, 2
Wendel, 225.
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Hyer, 4 Wen-
dell, 170. Chap-
man v. Him-
mersley, 4 Wen-
dell, 173.
Young v.
Grundy, 6
Cranch, 51.

sion until ten o'clock in the evening; and while it was in his possession, subscribed shares, by proxy, for others, to the number of twenty or thirty thousand, many of which were in the names of persons insolvent, and that neither *Buel*, nor any of the commissioners present at *Kingston* examined the powers authorizing subscriptions to be made by *Buel*, if any such existed, and the sum of two and a half *per cent.* on the amount of shares so subscribed by *Buel* as directed by the act of incorporation, was not paid or deposited by him or any other person. That while the subscription book was in the possession of *Buel*, as aforesaid, several persons duly authorized by others to subscribe for them, and in their names, were waiting for an opportunity to subscribe, and were ready to pay the deposit required by the act, and repeatedly solicited permission to subscribe, which *was not granted. That in several instances more was subscribed than the persons subscribing were authorized; and in other instances no deposits were made on the shares subscribed; and that the respondents had requested *Buel* and the other commissioners to expunge from the subscription book the subscriptions thus irregularly and illegally made by *Buel*; which the commissioners had not done. The bill, besides requiring an answer to the several matters, prayed that a writ of injunction might be issued, to restrain the said commissioners from acting as inspectors of the election of directors of the said bank, and from making any certificate of any such election, and from delivering to any person whatever the said subscription books, or money deposited on the shares so subscribed, and from taking any measures whatever to organize the said bank. The bill was sworn to by *Jacob Johnston*, one of the respondents; and an injunction was issued thereon, according to the prayer of the bill.

On the 29th of *July*, 1811, the answer of some of the appellants was filed, and on the 31st of *August*, 1811, the answer of the other appellants was also put in and filed. Previous to filing the answers, an *order* was made by the chancellor, on the 8th of *July*, 1811, requiring the appellants to *show cause*, on the first day of the then next term of the Court of Chancery, why an *attachment* should not issue against them, for disobeying and violating the injunction which had been issued. At the *October* term, the appellants showed cause, referring to the matters set forth in their answer. After hearing the matter argued by the counsel of the parties, the chancellor, on the 23d of *January*, 1812, made the following order: "The counsel for the complainants, and the counsel for the defendants, in the above cause, having been heard during the last *October* term, on the subject matter of the order made in this cause, on the eighth day of *July* last, that *Jesse Buel* (and others) show cause on the first day of the then next term, at, &c. why an attachment should not issue against them for violating the injunction issued in this cause, and due deliberation thereupon being had, &c. *It is ordered* that process of attachment issue against the said *Buel*, (and the appellants, nam-

ing them,) directing the sheriffs of the counties in which they respectively reside, to bring them before the court on some day of the next term after the same shall issue, to answer upon interrogatories touching the contempt alleged to have been committed by them, in violating the process of this court, and to be further dealt with according *to law." From this order the defendants below appealed to this court, and the appeal was accordingly entered and filed.

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Baldwin, for the respondents, now moved to quash or dismiss the appeal with costs. He contended, that an appeal would not lie from such an order, which could not touch the merits of the cause. The constitution, in speaking of this court, mentions only appeals from *decrees* in equity, on which the chancellor is required to assign his reasons for the decree. The act organizing the court, (Sess. 24. c. 10. s. 8. 2 R. S. 166. 169. sec. 24. 27. and sec. 2 R. S. 605. et seq.) says, that "All persons aggrieved by any sentence, judgment, decree, or order of the Court of Chancery, may appeal from the same or any part thereof." By the word *order* must be understood, such an order as affects the merits of the case, and by which the party is aggrieved. Will an appeal lie from every order which the chancellor may make, in the progress of a cause, or to regulate the practice of his court? According to the course and practice of the Court of Chancery, twenty different orders may be necessary in the progress of a suit, before it can be brought to a final hearing. If appeals are to be allowed from all these orders, it would produce the most ruinous consequences to the parties, and extreme embarrassment to the court. While one appeal was pending, a party might die; the cause must then be remanded, to bring in the representatives of the deceased party; and so in every appeal. Witnesses might also die in the mean time, and their testimony be lost. It would be impossible to predict the final end of a cause, if such a practice should be tolerated.

How can the chancellor assign special reasons for the numerous orders made by him, regulating the practice of his court? The object and business of this court is to settle the law, and put a final end to controversies; not to decide on points of practice which must be, in some degree, arbitrary.

Besides, it may be that the respondents, when they come to answer on the interrogatories, will purge themselves from all contempt as to violating the injunction. Why, then, should this court interfere before they have been heard, and the chancellor has decided on the sufficiency of the excuse?

Henry, contra. The constitution declares that a court shall be instituted for the trial of impeachments and the correction of errors, under the regulations which shall be established by the legislature. We must look, then, to the statute organizing this court; and that *gives an appeal from every sentence, judgment, *decree* and *order* of the Court of Chancery.

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An appeal does not suspend the proceeding in the cause, except so far as relates to the interlocutory matter appealed from.

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The appeal in this case is sufficient to possess this court of the merits, and to enable it to decide on the whole jurisdiction of the Court of Chancery, as to this injunction.

In *England*, the House of Lords, upon the model of which this court is formed, has "a jurisdiction ample and uncircumscribed, comprehending all interlocutory orders, as well as the final decree, and including a power of referring and modelling the necessary relief." (1 *Woodd.* 232—240. 4 *Johns. Rep.* 510.)

The answer of the appellants admits the facts, disclaims the contempt, and denies the jurisdiction of the chancellor. The matter has been discussed and decided upon by the Court of Chancery, as appears from the order itself. The appellants have answered all that could be extorted from them on interrogatories.

T. A. Emmet, in reply, said that *Wooddeson*, cited by the other side, showed what orders were the subject of appeal. They must affect the rights of the parties and the relief prayed.

In the case of *The Trustees of Huntington v. Nicoll*, (3 *Johns. Rep.* 516,) this court decided that an appeal would not lie from a temporary order of a Court of Chancery awarding an injunction.

You might as well sustain an appeal from a *subpœna*, on the ground of its being an *order* of the court. An attachment is merely the first process of investigation. Who ever heard of an appeal from such an initiatory order? The appeal is premature, disorderly, and unprecedented. The only question raised by this motion is, whether an appeal lies from such an order? The merits of the controversy are wholly out of view.

They cannot be examined by this court, until they have been brought before the court below.

YATES, J. This is an appeal from an order of the 23d of *January* last, of the Court of Chancery, to attach *Jesse Buel* and nine other persons, for a contempt in disobeying an injunction of that court. A motion has been made to *quash* the petition of appeal, on the ground that it cannot be sustained on such an order.

By the eighth section of the statute, (a) regulating the proceedings in this court, in virtue of the thirty-second article of the constitution, it is enacted, that all persons aggrieved by any sentence, judgment, decree or order of the Court of Chancery, may appeal from the same to this court.

It never could have been intended that all orders made in the progress of a cause in that court, should be subjects of appeal. Such a construction given to the statute, might, as has been observed by the respondents' counsel, so effectually impede the proceedings in chancery, as to render that court an engine of oppression. On the contrary, it appears to be a principle not controverted, that there is a class of orders arising in the progress of a cause from which no appeal lies, and a class susceptible of review by appeal. In the case of *Newkirk and Wife* against *Willet*, (2 *Johns. Cases*, 413,) the *Chief Justice*, who gave the opinion of this court, says, that "such

(a) 2 R. S.
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a distinction must and does exist;" and in the case of *The Trustees of Huntingdon v. Nicoll*, (3 *Johns. Rep.* 586,) in the opinion delivered by another member of this court, the same construction is given to the statute. And in *M'Vickar v. Wolcott*, (4 *Johns. Rep.* 529,) that distinction is recognised.

It appears to me impracticable to establish a definite rule on this subject, as every order must, in some measure, depend on its own peculiar features, to ascertain whether it will admit of an appeal. Perhaps I might undertake to say, that such only as are grounded on facts disclosed in the bill and answer, and, consequently, connected with the merits of the controversy, when final as to the subject matter of their order, so as to enable this court to decree whether the party has been aggrieved or not, may be deemed proper subjects of appeal. If this be correct, it only remains to be inquired into, whether the order now before us is of this description.

The appellants were enjoined as commissioners not to proceed in the apportionment of certain shares, nor in the election of directors. The complainants in the court below having satisfied the chancellor that the defendants were proceeding in violation of the injunction, an order was obtained for them to show cause why they should not be attached. The cause shown was deemed by the court insufficient, and an order for the attachment was made by which the parties were to be brought in to answer on interrogatories, so that the court might come to a final determination in relation to the contempt. If such final order had been made, after they were brought into court and examined, and that had been the subject of appeal, it would present a different question to this court, and the argument in justification as to the impossibility of a compliance with the injunction, and whether the court had jurisdiction of the cause, might, perhaps, be properly urged; but on these subjects, according to my view, it is not necessary to give an opinion.

The appeal on this order, in its nature initiatory, was premature. It behoved the defendants to have submitted to answer on interrogatories, the purpose for which the attachment was to issue, and if the alleged contempt was not purged by the answers of the defendants in the court below, the opposite party having had an opportunity, according to the course of the court, to investigate the facts in relation to it, the decretal order of the chancellor would then be deemed final as to the contempt, and the appeal might, perhaps, be sustained. My opinion, therefore, is that the appeal be *quashed*, with costs.

KENT, Ch. J. It has been frequently admitted in this court, that there is a class of orders in chancery, which are not objects of appeal. (2 *Johns. Cases*, 413. 3 *Johns. Rep.* 586. 4 *Johns. Rep.* 528.) But there never has been any precise and definite line drawn between that class of orders which are, and that class which are not, the ground of appeal. Every person of sense and reflection will at once perceive that such a distinction does, and must, of necessity, exist. Orders of one kind or other arise upon every material step taken in the pro-

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gress of a suit in chancery ; and they become very frequent and numerous in a cause that is much litigated. Many of these orders relate to the process and practice of the court ; and to allow an appeal from every order, would not only be absurd but intolerably oppressive. Neither the constitution, nor the statute organizing this court, ever contemplated an appeal from any decree or order that did not involve a *decision* upon some matter touching the *merits* of the controversy ; for upon every appeal, the chancellor is to be called upon to assign the reasons for his decision. If we examine the cases and precedents, we shall find that appeals have never been sustained upon any other class of orders. In the present case, the question before the chancellor was touching an alleged contempt, committed by the appellants, in disobeying the process of his court, and he has made no decision upon that allegation. He has merely ordered process of attachment to bring in the party, to answer to the charge upon interrogatories. If an appeal will lie *upon this order, it will equally lie upon the award of process of *sub-pœna* to the defendant to answer to a bill filed. The very statement of the proposition shows sufficiently the unfitness of the thing. By sustaining appeals to the extent contended for in this instance, we should not only draw into this court the whole business of the Court of Chancery, before it had become ripe for discussion and decision there ; we should not only render the voice of that court mute, and its process nugatory, but we should destroy ourselves. This court would become wholly incompetent to despatch the immensity of business which would flow in upon it.

I am, therefore, of opinion, that the appeal ought to be dismissed.

VAN NESS, J. concurred.

SPENCER, J. also concurred. He said that on this appeal the merits of the cause could not be examined. The answer denies the facts contained in the bill ; and it cannot be said that the chancellor was misinformed by the bill. The rule is, that where an order is made affecting the rights of the parties, or imposing a grievance, an appeal will lie ; but not on a mere *practical* order.

THOMPSON, J. being related to some of the parties, gave no opinion.

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Per totam Curiam. ORDERED and ADJUDGED, that the appeal be dismissed with costs. Appeal dismissed.

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*THOMAS WATERS, Appellant,
against
EZEKIEL TRAVIS, Respondent.

A court of equity will compel a vendor to a specific performance of a con-

THE respondent, on the 17th *July*, 1802, filed a bill in the Court of *Chancery*, against the appellant, for an account, and the specific performance of an agreement, by which the appellant and one *Henry Wisner* were to convey to the respondent

part of lot No. thirty-nine in the angle of the *Minisink* patent, in the town of *Walkill*, in *Orange* county. The bill stated, that about sixteen years before, the complainant purchased of one *Corry* his improvements made on a farm of which the complainant, soon after, took possession, and which he has since continued to occupy and improve; that he understood, afterwards, that the farm was part of lot thirty-nine in the angle of the *Minisink* patent, and in *May*, 1787, entered into a verbal agreement for the purchase of the land with *Wisner*, who had informed the respondent, that he and *Waters* had purchased the undivided part of lot No. thirty-nine of the commissioners of forfeitures. The respondent agreed to pay one dollar per acre for the land, and paid *Wisner* one hundred and fifty dollars in cash, the receipt for which was lost; and in *June* he paid *Wisner* thirty dollars more on account of the purchase.

On the 19th of *October*, 1787, the respondent entered into written articles of agreement with *Wisner* and *Waters*, which were duly executed by them, which stated as follows: that *Waters* and *Wisner*, "the parties of the first part, do agree, and have sold to the party of the second part, (*Ezekiel Travis*.) three equal undivided *fourth parts of one equal undivided half part of lot No. thirty-nine in the angle of the *Minisink* patent, and the said *Wisner* and *Waters* do hereby bind themselves, their executors and administrators, to give to the said *Travis* a good and sufficient deed, in law, for the above said three equal undivided fourth parts of one undivided half part of the said lot No. thirty-nine, which lot contains 1,170 acres, more or less: which conveyance is to be executed on or before the first day of *December* next. And the said *Travis* doth hereby bind himself, &c. to secure, at the same time, to the said *Wisner* and *Waters*, one dollar for each and every acre of the lands hereby sold; and for the true performance of the above said articles, the parties bind themselves to each other in the penal sum of five hundred pounds."

The bill further stated that the respondent, ever since the agreement, continued to reside on the lands, and had in his actual possession two hundred and thirty-four acres, on which he had made great improvements; that in *November*, 1787, he sold to *Wisner* a pair of oxen on account of the contract, valued at forty dollars; and delivered to *Wisner* turnips, at different times, to the value of two dollars and sixty-eight cents; and not long afterwards gave *Wisner* a power of attorney to receive a sum of money due to the respondent for a pension, being either twenty-five or forty-eight dollars, which sum he did not exactly know, as the appellant refused to inform him of the sum received. That the reason why the payments made subsequent to the contract were not endorsed upon it, and the previous payment acknowledged in the agreements, was because the respondent was unacquainted with the forms of business, and wholly confided in *Wisner* and *Waters*. That during all the transactions, the respondent believed the legal title to the land to be in *Wisner* and *Waters*, as he was told

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tract for the sale of land, for a part of the land, where he has incapacitated himself from conveying the whole.

And where the land contracted to be sold was held in common, and the vendor, after the agreement, divided with the other tenants in common, and executed a deed of parti-

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tion, it was held that the partition was no objection to a specific performance, where the party was capable of performing the whole; but there is a distinction, in this respect, between the case where the vendee seeks to compel the vendor to a specific performance, and where the vendor resorts to equity to compel a specific performance on the part of the vendee.(a)

But a conveyance for a valuable consideration, made bona fide to a third person,

(a) A court of chancery may decree a specific performance, as against a party who would not be permitted himself to demand it. *Hepburn v. Hunlop*, 1 *Wheat.* 200.

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without notice of the previous contract of sale, and before it has been carried into execution, will transfer the legal title to such third person.

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Mere lapse of time is not, in all cases, an objection to decreeing a specific performance of an agreement.

And where an agreement for the sale of land was suffered to remain unexecuted for 14 years, the vendee having continued in possession, the court, under the circumstances of the case, decreed a specific performance of the contract. (a)

Where on a bill in chancery, for a specific performance of an agreement to convey land, the complainant alleged a payment of part of the purchase-money, under a verbal agreement, prior to the written contract, and a feigned issue was awarded to try the fact as to the payment, and the jury found the fact; it was held, that the

(a) Vide *Pratt v. Carroll*, 8 Cranch, 471. *Pratt v. Law*, 9 Cranch, 456. *Brasheir v. Gratz*, 6 Wheat. 528.

by *Wisner* that it belonged to them jointly, and that payment to him was the same as if made to both; and that the verbal agreement with *Wisner* and the payment of the one hundred and fifty dollars to him, the respondent believed, were made with the knowledge and approbation of the appellant. That in *March*, 1790, *Wisner* died insolvent; and since his death the respondent has often demanded a deed from the appellant, offering to pay or secure the principal and interest due for the land; but though the appellant sometimes expressed himself willing to give a deed, he finally refused to do so; and commenced an action of ejectment against the respondent to recover the possession of the land, which was tried at the *Orange* circuit, in *June*, 1802, and a verdict obtained *against the respondent, who expected to be turned out of possession. At the trial, the appellant produced a deed to himself from the commissioners of forfeitures, for the lands, or a considerable part thereof. The appellant has not, since the power given him to receive the pension money, demanded any further payments, though the respondent has often told him he had paid for more lands than he possessed; and that the appellant has said that the respondent should have as much land as he had paid for, and had caused a part, about two hundred and thirty-four acres, to be surveyed off as the respondent's land; and at the time of such survey had said that the respondent had paid for it. The bill prayed for an account, and that on payment of the residue of the money, if any should be found due for the land, the appellant might be decreed to make a good and valid conveyance of the land, in fee-simple, to the respondent, and for general relief.

The *answer* of the appellant stated that he purchased the land in question, in *May*, 1786, in his own name, and a conveyance was made to him solely, and that it remained his sole property, except, that by a verbal agreement, *Wisner* was to have a share of it, on paying a certain sum, which he never did. He admitted the execution of the written agreement set forth by the respondent; and that the reason why *Wisner* executed it, was because of the verbal agreement between him and the appellant. The respondent denied all knowledge of the payments set forth by the respondent; and believed they were made to *Wisner* on other accounts, as the respondent had been a tenant of *Wisner's*, and owed him rent; and because the respondent had given a bond for twenty pounds to *Wisner* which was unpaid at his death. He admitted the delivery of a yoke of oxen, which the respondent said *Wisner* had purchased of him, but denied that it was on account of, or in part payment for, the land. He also admitted that after the year 1790, he received a power of attorney from the respondent to receive some money due to him for a pension, under which power he received twenty-four dollars, and having an account against the respondent, he retained the money so received; and soon after told the respondent how much he had received of the pension; but the respondent never asked him

for the money, nor requested him to credit it on account of the land. That after the date of the agreement, the appellant and *David Johnson* who owned the other, undivided part of lot thirty-nine, made a partition, and released to each other, and the part in the possession of the respondent fell to the share of the appellant; *that several years after, the appellant having made frequent applications to the respondent to pay for the lands, without any effect, the respondent saying it would not be in his power to pay for them, the appellant, with the knowledge and consent of the respondent, sold and conveyed two parcels, one of fifty acres, and the other one hundred and fifty acres, part of the same land; and that the whole of the residue which fell to the appellant, on the partition, is in the respondent's possession. The appellant denied that he was ever present at any survey of the land, except to run the division line between him and *Johnson*, the other survey being made in his absence; or that he ever admitted that the respondent had paid for the land in his possession; or that he knew any thing of the conversation between the respondent and *Wisner*. He admitted that he had offered to convey to the respondent such parts of the land, comprehended in the agreement, as were in the respondent's possession, on his paying for the same, at the price mentioned, with interest thereon, and also on the price of the other parts of the land sold, up to the time they were sold, which the respondent had neglected to do; that the appellant did bring the action of ejectment, as stated by the respondent, and which was contested by the respondent, and tried, and a verdict found for the appellant. The appellant denied all other material allegations in the bill.

A *replication* was filed by the respondent, and witnesses were examined on both sides; but as their testimony was contradictory, and a feigned issue was afterwards awarded, it is unnecessary to state the evidence.

The cause was heard by the chancellor, in *May*, 1805, on the facts stated in the depositions and the points of equity raised, and in *December*, 1805, an order was made for the trial of a *feigned issue*, to ascertain whether the respondent paid the one hundred and fifty dollars in *May*, 1787, and the thirty dollars in *June*, as part of the consideration for the purchase of the land; and whether *Wisner* received those sums as such; and whether the yoke of oxen was sold and delivered, in *November* following, to *Wisner*; and whether he agreed that the price should be a part consideration for the land. This issue was tried, in *September*, 1807, and the jury found by their verdict, that the two payments had been made, and the yoke of oxen sold and delivered to *Wisner*, in part payment of the consideration money, for the purchase of the said land. The *postea* being returned to the Court of Chancery, the cause was finally heard; and the chancellor, on the 27th of *October*, 1808, pronounced *a final decree. The respondent's counsel waiving all claim against the appellant in regard to so much of lot No. 39, as the appellant had, before the filing of the

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defendant having acquiesced in the feigned issue, and controverted the fact, at the trial, could not, afterwards, object to the decree allowing the payment in part of the purchase-money.

And where the agreement was, that *A.* and *B.* should sell and convey to *C.*, and the payment was made to *A.* who in fact, had no legal title to the land, it was held that *B.* could not, afterwards, object to such payment, but it was to be considered, in effect, the same as if paid to *B.*

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answer, become incapacitated to convey, by reason of the partition made between him and *Johnson*, or by reason of the conveyances of the two parcels of the said lot, set forth in the answer, or by reason of another parcel conveyed, at or before the partition, to *Thomas Waters*; the chancellor ordered and decreed that the appellant convey to the respondent, by a good and sufficient deed, in the law, so much of the land contained in the said lot No. 39, not exceeding three equal fourth parts of one half of the said lot, as the appellant had not become incapacitated to convey, by reason of the partition and release and the conveyances mentioned; and that it be referred to a master to take an account of the quantity of land to be conveyed, and of the payments made by the respondent, and to state an account between the parties, charging the land so to be conveyed at one dollar per acre, and deducting the payment of one hundred and fifty dollars, made in *May*, 1787, and the sum of thirty dollars paid in *June*, and such amount as should appear to be due to the respondent from the appellant, on account of moneys received by him on the pension payable to the respondent; and deducting also forty dollars for the oxen sold and delivered to *Wisner* in *November*, 1787, and charging the appellant with the price of the turnips, to be ascertained by the master; and charging interest, from the 1st of *December*, 1787, on the balance, as may appear to have been due; and that on the respondent's paying to the appellant such balance, if any, as upon such account should be found to be due for the land, the appellant should make the conveyance aforesaid; reserving the question of costs and all further directions till the coming in of the master's report.

The reasons for this decree were thus assigned by

THE CHANCELLOR. The bill in this cause was filed for a specific performance of a contract entered into between the complainant, of the one part, and the defendant and *Henry Wisner*, of the other part. The contract is dated the 19th of *October*, 1787, and is set forth in the complainant's bill, and its purport is generally admitted by the defendant's answer.

This contract binds the defendant and *Wisner* to give to the complainant a *good and sufficient* deed, in the law, for three equal undivided fourth parts of one equal undivided half of lot No. 39, *in the angle of *Minisink*, which lot contains 1,170 acres more or less, and to execute such conveyances before the first day of *December* then next; and the defendant was then, by its terms, "to secure at the same time to the said *Wisner* and *Waters*, one dollar for each and every acre of the land sold."

From the proofs in the cause, it appeared that the legal title to this land was exclusively in *Waters*, though there were strong indications that *Wisner* was originally interested equally with him.

It was, however, of little consequence to the merits of the cause, as whether he was or was not would not vary the decision.

As the objection respecting the want of parties, which was

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urged as a preliminary question, was waived in consequence of an intimation, that if it prevailed, it would only operate to open the bill for amendment, by adding the necessary parties, the only questions necessary to be determined were,

1. Whether the complainant could have relief, as he did not entitle himself to a performance *in toto*?

2. Whether the evidence of the payments alleged to have been made before the contract was admissible?

The cases cited on the argument before me did not support the doctrine for which they were adduced.

The case of *King v. Wrightman* (2 Anstr. 80) arose on a bill for specific performance of a contract, respecting a lease which had seven years to run at the time of making the contract. Two years elapsed and a decree was entered, by consent, to accept the same sum which was to be paid two years before.

Lord Chief Baron *Eyre* observed, "when you brought a bill for a specific performance, you ought to have considered whether it was for your benefit or not. This is the most beneficial decree which could have been pronounced for the plaintiff. We can only, on this bill, decree specific performance of the same contract, not a similar one." But the rehearing was denied chiefly on the ground of consent.

In the case of *Goring v. Nash*, (3 Atk. 185,) it was held that the contract must be performed in its entirety; for a reason which to me appears unanswerable, "because nobody can tell what the parties laid the greatest weight on; and therefore it must be attended with bad consequences, if agreements *were to be split*, and one part to be decreed and another not."

The case of *The Executor of Morrison v. Welling* was settled by compromise, though in consequence of my intimation that the *defendant was not compellable to pay the money stipulated by the contract, unless the whole of the land contracted for was conveyed, and that no *pro rata* payment could be enforced.

There can be no doubt but the parties contracting may, by mutual concession, narrow their rights derived from the contract, and the parties, in this case, appear to have done no more.

The complainant, by the terms of the contract, was entitled to an undivided share of lot No. thirty-nine, equal to four hundred and forty acres, upon securing the payment of one dollar an acre. The defendant made partition with his cotenant, with the assent of the complainant, as he expressly states in his answer. He sold and conveyed two hundred acres of the parcel assigned to him, as his portion of the common land, as the complainant informed him it would not be in his power to pay for it; and the residue, it is admitted, was, and still is, in possession of the complainant; and this residue is all the complainant claims.

Part of the land contracted for, has, therefore, received a destination perfectly conformable to the interest of the parties to the contract. It is, in effect, so far a performance of the contract, and in every respect consistent with it.

The rule that a written contract cannot be impugned by parol, does not apply to this case. There is no cause of controversy;

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for both parties concur in stating the circumstances detracting from the rights of the complainant under the contract, accompanied with a full admission of its existence in its original state.

The second question depends on the terms of the contract and the circumstances attending it, disclosed by the testimony.

The contract contained a plain stipulation, that upon receiving the conveyance the complainant should secure, *at the same time*, to the said *Wisner* and *Waters* one dollar for every acre of the land so sold. This does not import a previous payment. On the contrary, it appears to impose it on the complainant, if he had paid any part of the consideration, to secure a dollar an acre in addition.

Evidence of payment before the contract, unless proved to have been omitted by mistake or fraud, must, on the well established rule respecting written contracts, be rejected; but it was admitted that the defendant is illiterate, and there seems to be no doubt that *Wisner*, one of the parties, drew the agreement; and hence I thought the payment and reason of the omission were proper objects of inquiry. If the payment had actually been made, I thought *that combined with the long forbearance of the complainant and *Wisner*, the latter on the verge of insolvency, a strong presumption would arise that the money had been intended in payment of the land, unless rebutted by other evidence.

The first payment spoken of was one hundred and fifty dollars which was alleged to have been made on the 7th of *May*, 1787, but of which the defendant denies any knowledge. If this payment was actually made, and omitted to be acknowledged in the contract, either through mistake or design, it ought now to enure to the benefit of the complainant.

As to the objection that the payment, if any, was made to *Wisner*, who it appears had no interest, it ought not to prevail.

This was a joint contract with the defendant and *Wisner*. The security for the consideration money was to be joint; and I think a payment to either must be deemed a good payment on the contract, in consequence of their apparent union of interest; and it was not imposed on the complainant to know the secret trust which the defendant now insists existed between them.

The testimony with respect to the payments was involved in doubt. It required accurate estimates of the relative credibility of the witness to determine correctly on the occasion. This is the appropriate object of a jury; though I regretted, from the small sum in controversy, that this expedient was necessary to be resorted to.

I directed an issue to determine whether any and what payments had been made, and at what periods, by the complainant to the defendant and *Henry Wisner*, or either of them, on account of the contract.

I did not conceive the question, whether the written contract was to be deemed a mutual and dependant contract, as requiring a minute examination. The acts of the respective parties were evidently intended to be concurrent. The nature of the

transaction indicated that the defendant and *Wisner* were to do the first act—to convey. The only point of view in which it could be material, was with respect to the lapse of time. This was imputable to neither, as contradistinguished from the other.

The complainant was in possession of the land contracted for. The defendant and *Wisner* were inhabitants of the same county in which the land lay, and in a geographical sense, as taken from a general knowledge of the county, they were not remote from it. The mere acquiescence in his possession for a length of time, without any claim, is a circumstance, at least, sufficient to show that the forbearance was mutual.

*The issue awarded having been tried, and found in favor of the complainant, the cause again came up, on the equity, reserved for a final decree.

On the part of the defendant, it was objected,

1. That there were not proper parties.
2. That the payments found by the jury were repugnant to the written contract, which ought to control; and
3. That the bill being for a specific performance could not be sustained, unless it is sustained *in toto*.

The first question had already been discussed, and determined in favor of the defendant and expressly waived by him; and though it was urged that this was merely waiving the objection at the hearing, I had no doubt but that from the mode of making the waiver, it was to be carried throughout the cause; for after the defendant had succeeded in obtaining the opinion of the court, that the representatives of the defendant *Wisner* ought to have been parties, and had formally and explicitly waived the effect of that opinion, alleging that it was done to prevent the parties from travelling over the same ground, which they had already passed, it did not lie in the mouth of the defendant to resort to it, as the calling in those representatives was principally to make them parties to the account to be taken on the contract, for his benefit, and to aid him in its adjustment.

A new suggestion was, however, made on this subject, which, it appeared to me, would have gone the length of deciding this question, contrary to the opinion before expressed, if it had been an open one, and that was, that the defendant alleged that *Wisner* never had a legal title to the land affected by the contract; that the conveyance for it was in the defendant *Waters*' name, and that *Wisner* was to have had a share, when he paid his proportion of the consideration money, which he never did, and of consequence, if the defendant *Waters* held it as he then alleged in his answer, discharged from the trust for the non-payment, he could give a legal title for the entirety, and if he held it in trust, at the time the contract was made, that contract operated as a new declaration of a trust, with the consent of all parties interested, and a destination was given to it, for the benefit of the complainant, who became *custui que trust* as to the land, and *Wisner* only entitled to a share of the consideration money.

The second question had, on the former argument, and be-

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fore the issues were awarded, been determined upon, and still thinking. *that if those payments had been made, and they were affirmed by the verdict of a jury, *this omission must have arisen from fraud or mistake*; and not meaning to touch the general doctrine, that written contracts are not to be impugned by parol, unless on those grounds, I was of opinion, that the cases cited on the argument had no bearing on the case.

The third question had also been passed upon; it was decided on the ground that the parties contracting, may, by mutual concession, narrow their rights derived under the contract. The complainant contracted for the purchase of three undivided fourths of an undivided half of 1,170 acres, equal to 438 3-4 acres. The complainant and defendant had, by their mutual acts, assented to a division, so as to enable each of the parties entitled to moieties to hold in severalty. In the share allotted to the defendant, the two hundred and thirty-four acres in the possession of the complainant were included. The defendant, in his answer, alleged that he had sold the remainder; and the complainant expressed his disposition to refrain from disturbing the sale, and to retain and pay for the two hundred and thirty-four acres, according to the contract.

● It is probable the complainant could not have succeeded for more, as for a specific recovery; for if the defendant was a trustee for the complainant, and a *bona fide* sale had been made, without notice of the trust, the purchaser would hold discharged of the trust. But can it be equitable, that because a man has escaped from his contract, by parting with part of its subject matter improperly, and thus prevented the complainant from receiving complete justice, that this should operate to discharge the defendant wholly from the performance of his contract, specifically, *pro tanto* as he has it in his power? Certainly not, nor was any case cited which goes that length.

The doctrine that a contract enforced specifically must be so in its entirety, appears to me solid; but where the right of the one party is sustained, and the other can only shelter himself, by the allegation that part of the property sought is not in his power, and so placed by his own act, from a complete compliance with it, the rule of equity as to the entirety must be strangely misapplied, if it could possibly prevent the party injured by the alienation, from saying, "True it is, I am entitled to the whole, but under all circumstances, I am content to accept what is in the power of the defendant to give, and relinquish my right to the remainder."

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*It is every day's practice, in the courts of common law, thus to contract the rights of a plaintiff, the amount of whose recovery is either inconsistent with his claim, or where the plaintiff is disposed to relinquish a part of it; and to effect that the defendant's consent is not necessary.

If this is so in cases of pecuniary demands, I can discover no reason why it should not equally apply to claims for the performance of contracts specifically.

The complainant, at the hearing, professed his willingness to

accept the two hundred and thirty-four acres in his possession ; to pay for it, in the terms of the contract ; and to relinquish his claim to the remainder : thus settling the contract definitively, and retaining no claims under it.

I, therefore, directed it to be referred to a master to take an account on the contract, charging the complainant, according to its terms, for the land in his possession, and crediting him with the sums found to have been paid on account thereof, to the end, that the defendant might be decreed to convey in fee to the complainant the land he possessed, upon the payment of the balance due on the contract settled on those principles.

The conveyance ought to be for the whole, as he had the title to the whole, as appears from his admissions in the answer.

I was also of opinion, that the defendant ought to pay costs.

All other directions were reserved till the coming in of the master's report.

Riggs and Baldwin, for the appellant.(a) 1. This cause is interesting only as it regards a very important branch of the powers and rules of a court of equity, as to the specific performance of contracts. We contend that the decree is a gross misapplication of those rules ; as it admits parol proof, and decrees a *partial* specific performance of a contract. The exercise of the equity powers in regard to the specific performance of contracts is *discretionary*. The Court of Chancery is not bound to decree a specific performance ; but will always weigh with great caution the circumstances of every case, before it decides in favor of the complainant. (*Buxton v. Lister* 3 Atk. 383—386. *Underwood v. Hitchcock*, 1 Ves. 279. *Radcliff v. Warrington*, 12 Ves. jun. 326.)

*If the party who seeks a specific performance has been guilty of great delay, it is always a decisive objection to granting him relief in equity. *Time* is material in regard to the performance of a contract in equity as well as at law. If a purchaser is not merely inactive, and does nothing ; but if he does not evince a marked intention and eagerness to carry his contract into execution, a court of equity will not aid him, though he has paid part of the purchase-money. (*Harrington v. Wheeler*, 4 Ves. jun. 686—690, and in note. *Lloyd v. Collett*, *Sugden's Law of Vendors*, 245—248. 13 Ves. jun 225—229, *Alley v. Dechamps*.)

Here was a wilful delay for fourteen years, on the part of the respondent ; and by defending the suit at law, he showed a complete *renunciation* of the contract. Why did he not, at that time, file his bill, instead of defending the suit in ejectment. As to the lapse of time, it is no answer to say, that the appellant did not execute and tender a deed. It is a settled rule that the purchaser, not the seller, must prepare and tender the conveyance. (*Sugden's Law of Vendors*, 163. 1 Lev. 14. 2 *Smith's Rep.* 543. 1 *Forr. Exch. Rep.* 61.)

Payment of money, or taking possession, does not amount to a part performance as to lands, though it may as to chattels.

(a) The reporter not having attended the session of the Court of Errors in 1812, is indebted to I. H. Tiffney, Esq. for the notes of the arguments of counsel, which he has obligingly communicated. He has also been much assisted on this, as on so many other occasions, by the

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2. Again, the respondent must stand on the grounds set forth in his bill; (6 *Johns. Rep.* 543. 1 *Bro. Ch. Ca.* 92;) and there is no allegation of fraud, mistake or surprise, in making the agreement, which was read to him.

Where a party seeks the specific performance of a written contract, no parol proof is admissible to vary the agreement; though it may be received to rebut an equity. (*Jordan v. Sawkins*, 4. *Bro. Ch. Ca.* 476. *Townsend v. Stangroom*, 6 *Ves. jun.* 328—332. *Rich v. Jackson*, *ib.* 334, in note. *Robson v. Collins*, 7 *Ves. jun.* 130—133. *Woollam v. Hearne*, *ib.* 211—219. 1 *Br. Parl. Ca.* 200. (2d edit.) 2 *Br. Ch. Ca.* 559. 1 *Ch. and Lef.* 38, 39, 42. 1 *Anst.* 80.) There is no pretence of fraud, mistake, imposition, or surprise, in this cause. Under the prayer for general relief, the party cannot be relieved upon any ground not set forth in his bill; here the bill proceeds exclusively on the written contract. It suggests no other ground for relief. (2 *Ves.* 299. 3 *Ves. jun.* 402. 416. 420.

3. A specific agreement must be executed *in toto* or not at all. A performance is not always decreed according to the written agreement, until it is corrected according to truth and justice, of fraud or mistake, and then it is executed *in toto*. (3 *Atk.* 190. 1 *Anst.* 80. 6 *Ves. jun.* 328—341.)

The contract, bill and decree all differ, as to the quantity of acres. The decree differs from both contracts, and refers it to a master to ascertain the quantity, as well as the price of a quantity of turnips, forming a part of the consideration, according to the decree. In *Milnes v. Gery*, (14 *Ves. jun.* 400. 407,) where there was an agreement of sale according to the valuation of two indifferent persons, to be chosen by the parties, and a bill was filed for a specific performance, praying that the Court of Chancery would appoint a person to make the valuation, the court dismissed the bill.

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*4. Again, a person cannot be permitted, by parol evidence, to contradict or invalidate his own deed, as to any point, unless it be in cases of fraud, mistake or surprise, set forth in the bill. (1 *Ves.* 127, 128. 1 *P. Wms.* 203. 5 *Ves. jun.* 688. 2 *Atk.* 575. 1 *Br. Ch. Ca.* 92. 7 *Ves. jun.* 218. 4 *Cranch*, 224.)

Admitting the parol proof, both that and the decree grossly contradict the written contract. In *Mortimer v. Orchard*, (2 *Ves. jun.* 243,) where the witness for the plaintiff proved an agreement different from that set forth in the bill, and the defendants in their answer stated an agreement different from both, it was held that the bill ought to be dismissed.

Bunner and E. Williams, contra. There must be a decree for the respondent on some ground, either for a whole or a part of the land, either upon the principle of allowing the payments, or, if disallowed, upon paying the whole amount again, with interest. The bill prays for an account; and that, on payment of what may be due, the defendant may convey; and for general relief. And the appellant, in his answer, seems to admit

that there may be either a total or partial performance of the contract. *IN ERROR.*

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From the evidence it appears that *Wisner* not *Waters*, paid the whole consideration money for the land to the commissioners of forfeitures; *Wisner*, therefore, was the actual owner of the land, though the title was taken in the name of *Waters*, who was his son-in-law. *Waters* was, therefore, but a mere trustee, and was bound to fulfil the agreement of *Wisner*, and to convey to any person holding the equitable estate. (1 *P. Wms.* 277.)

Equity allows compensation for the part that is deteriorated, and so it sometimes decrees a part performance. (2 *Br. Ch. Ca.* 118.) The vendee cannot object to the part performance. Every fact making out fraud, imposition or mistake, is substantially, if not formally, charged in the bill. The parol evidence does not vary from the written contract. *Wisner* had a resulting trust in the deed to *Waters* which is susceptible of parol proof. Parol proof has been admitted to prove an omission of a clause of redemption in a mortgage. (3 *Atk.* 388.) So parol proof has been admitted to show that a person who made a purchase and took a deed in the name of another, had paid his own money. (1 *Vern.* 366. *Prec. in Ch.* 103.) But the objections now raised, were waived by going to trial on the feigned issue, and suffering the evidence to be given at the circuit, without making any objection.

Travis has *bona fide* paid all the consideration money, and if he had not, he is willing to do so, and that is sufficient to entitle *him to a decree in his favor. The objection of the appellant goes to the remedy, not to the right.

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If the party means to avail himself of the statute of frauds, he must plead it, or rely upon it in his *answer*. It is too late to be objected here. (6 *Ves. jun.* 12. 38, 39. 504, 505.) Besides, a part performance takes the case out of the statute; and a part payment was a part performance. (3 *Atk.* 4. 4 *Ves.* 720. 3 *Ves.* 39, *note.* 4 *Ves.* 91.) An antecedent possession under another title can make no difference. (7 *Ves.* 130.)

Time is not always material in executory contracts. But there was, in fact, no delay on the part of the respondent. He paid the money and got possession of the land in season. He is not shut out by the statute of limitations. It is for chancery to relieve against the lapse of time, when the party has not abandoned his right. Had the respondent delayed a few years longer, the law would have presumed a grant to him.

As to the objection that the respondent waived the agreement, by defending the ejectment suit, it may be said, that in *England*, it has been held that a trustee could not maintain ejectment against his *cestuy que trust*; and it is very lately that it has been decided in this state, that an equitable title cannot be set up in defence to an action of ejectment. (2 *Johns. Rep.* 221. 84.) A tenant, by permission also, is entitled to notice to quit; and these considerations probably influenced the respondent in defending the ejectment. It is clear

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that the price of the land was one dollar per acre. This is acknowledged by the appellant.

Under the prayer for relief generally, the party is entitled to any specific relief not inconsistent with it. (6 *Ves.* 28. 335, 336, 337. 7 *Ves.* 134.)

SPENCER, J. The first objection to the decree is, that it decrees a specific execution of part of an entire contract; that the respondent will get a conveyance for two hundred and thirty-four acres, instead of four hundred and thirty-nine, to which he was entitled, if any. The agreement of 1787 was executory; it did not vest any legal title in the respondent; but it gave him a right to coerce the appellant and *Wisner*, by resorting to a court of equity, to a specific execution; or he had the election to sue at law, in case they refused to convey the lands to him, for damages. It cannot be controverted, that a conveyance for a valuable consideration, made *bona fide* to a third person, without notice of the agreement, and before it had been carried into execution, by a deed, would have passed to a third person the legal title. The appellant discloses, by his answer, that he *came to a partition with the other tenant in common, of the lot, an undivided part of which, commensurate to his interest therein, he had covenanted to convey to the respondent. I have not understood the appellant's counsel to urge this partition as an objection to a specific execution of the agreement; and had it been urged, it could not avail him. The respondent has a right to consider the appellant as acting for him in that partition. The act itself did not vary the rights of the parties; it was reducing to a certainty what was before uncertain; it was merely locating the three fourths of a half of the lot; and if the respondent acquiesced in that arrangement, he had a right to do so. The idea cannot be tolerated, that a man shall, by his own act, prevent another with whom he has contracted from receiving the benefit of his contract, when the thing contracted for substantially resides in the party contracting; but has merely undergone a modification. As it respects the appellant, therefore, it cannot be pretended that he is exonerated from a specific execution of his contract, because he has ascertained and located the interest he had in the tract as a tenant in common. Had the respondent complained of this interference, the result, probably, would have been different; but he is contented with it. He elects to consider the appellant as his agent, in that transaction.

With respect to the three parcels of the lot conveyed away by the appellant before his answer came in, the same remarks are applicable. The appellant cannot take advantage of his own wrongful acts, to discharge himself of a vested right in the respondent. Whether these conveyances would have stood the test of an inquiry instituted by the respondent is immaterial. He acquiesces in them; and so far the appellant has, by his own act, disabled himself from performing his contract specifically. It is against all my notions of justice, to allow the appellant to excuse himself from performing so much of the con-

tract as he can yet perform, because he has seen fit wrongfully to abridge himself of the power of performing the whole. And I again recur to the observation, that the converse of this proposition would not be just or true. The respondent might insist on having all the land or none, or he may elect to consider the acts of the appellant as his, and thus make valid what was wrongful.

The cases which have been cited, to show that a court of chancery will not decree a partial performance of articles, but will decree all or none, are not applicable to the case before us. As a general principle of equity, the proposition is incontestable; and *wherever it has been applied, as far as my researches go, it has been to a case, where the party called into equity to perform, has the ability of performing the whole, and where the other party was desirous of selecting a part of the subject matter, and taking it, unencumbered by another part. There is a settled distinction, when a vendor comes into a court of equity to compel the vendee to a performance; and when a vendee resorts to equity to compel a vendor to perform. In the first case, if the vendor is unable to make out a title as to part of the subject matter of the contract, which was the principal object of the purchaser, equity will not compel the vendee to perform the contract *pro tanto*. There are also other distinctions which it is unnecessary now to advert to. But where a vendee seeks a specific execution of an agreement, there is, says Mr. Sugden, (*Sug. Law of Vend.* 193,) much greater reason for affording the aid of the court at the suit of the purchaser, when he is desirous of taking the part to which a title can be made. And a purchaser (he observes) may in some cases insist upon having the part of an estate to which a title is produced, although the vendor could not compel him to purchase it. Thus in the case of *The Attorney-General v. Gower*, (1 *Ves.* 218,) tenants in common contracted for the sale of their estate, and one of them died, it was held, that the survivors could not compel the purchaser to take their shares, unless he could also obtain the shares of the deceased. But the converse of the proposition was denied; and it was held that the purchaser might compel the survivors to convey their shares, although the contract could not be executed against the heirs of the deceased. In another case, (10 *Ves. jun.* 315,) Lord Eldon held that if a man, having a partial interest in an estate, enters into a contract agreeing to sell it, as his own, he cannot afterwards say he has valuable interests, but not the entirety; and if the vendee chooses to take as much as he can have, he has a right to that, and an abatement. There are other cases to the same effect. (1 *Ves. jun.* 221. 2 *Bro. Ch. Cas.* 118. 326. and 1 *Bro. Ch. Cas.* 140.)

In the present case the land was contracted to be sold at one dollar per acre; and it is not set up by the appellant that the land in the possession of the respondent, and which was decreed to him, is more valuable than the other parts, sold by the appellant; and I am, on the justice of the case, as well as on authority, of opinion, that the decree, in this respect, ought to be affirmed.

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The next point made, was the delay on the part of the respondent *from 1787 to 1802. It was insisted that after such a lapse of time he had forfeited all right to a specific execution. Generally speaking, the obligation of an agreement binds the parties from the moment it is entered into; and place and time are circumstances affecting only the performance of the engagement; and do not import, in a court of equity, conditions by which the parties are to be considered as contracting on the ground of a strict compliance, but are mere circumstances admitting of compensation. (1 *Pow. on Cont.* 268.) It would be a great and unnecessary labor to examine all the cases on the subject of a strict compliance as to *time*, and to state the distinction between those cases where the lapse of time is an objection to a specific execution, and those in which it is not. In the present case, the agreement being in writing, the possession of the respondent, and the improvements he has made on the land, are not necessary to be regarded as a part execution of the contract, to take it out of the operation of the statute of frauds and perjuries. The ground I take, in considering the lapse of time from 1787 to 1802 as no objection in this case to a specific performance, is peculiar to the facts in the case, either proved or admitted.

By the agreement of 1787, the appellant and *Wisner* bound themselves to give a conveyance, on or before the 1st of *December*, in that year, at which time the respondent was to secure the purchase-money. These acts were to be concurrent. The conveyance must necessarily have preceded the security. The *laches* in not perfecting the contract is certainly as much, if not more, attributable to the appellant than to the respondent. The lapse of time, in a case like the present, where no material inconvenience has been suffered by the appellant, can be urged only on the ground that the agreement has lain dormant; and that this is evidence of the abandonment of it by the parties. In the case of *Lloyd v. Collet*, (4 *Bro. Ch. Cas.* 469,) (a) Lord *Loughborough* *said, the conduct of the parties, inevitable accident, &c. might induce the court to relieve, notwithstanding the lapse of time. Here, then, has been a continued possession, on the part of the respondent, from the period of the agreement to this time; not as a tenant, liable to rent, but as holding under the agreement. Had the respondent entered as a tenant originally, and then made the agreement, and continued to possess, the possession might have been viewed as a tenancy, and it might have been insisted that the possession was not an affirmance of the agreement. But

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(a) See the chancellor's opinion fully reported in 4 *Ves. jun.* 690, in a note. It is very imperfectly stated by *Brown*. In *Ballard v. Walker*, (3 *Johns. Cases*, 60,) there was a written contract to convey on or before a certain day, when the money was to be paid or received, and four years having elapsed from the date of the contract, without any thing being done, and before the vendee gave notice to the vendor that he should insist on the agreement, and five years elapsed before he actually tendered a performance, the Supreme Court held that the contract must be presumed to be rescinded, and that no action could be maintained upon it by the vendee, though it appeared that the vendor had, within a year after the date of the contract, incapacitated himself to perform on his part, by conveying the land to a third person.

as the case is, the continuance of the possession, by the tacit consent of the appellant, until he instituted the ejectment suit, was a constant and continued affirmance on the part of the appellant that the holding was under the agreement. This is irresistible evidence that the agreement was not abandoned by the parties ; and their conduct was such as to leave no doubt that they both looked to the future performance of it. This case, then comes within the principle laid down by Lord *Loughborough*. It is in vain to say that the respondent did not originally enter under the agreement. He did not enter as a tenant ; and unless he held under the agreement, he was a trespasser. It would be absurd to suppose that he was tolerated to live on the land for such a length of time, as a trespasser. The fair and natural interpretation of the act of possession is, that it was because the agreement had been entered into, and was expected by both parties to be performed.

I have said that no material inconvenience has been suffered by the appellant ; and the counsel have insisted, as a notorious fact, that the lands have appreciated. On this point we have no evidence ; but if it be admitted, are we to suppose that the appreciation of the land is greater than the interest of the money, in case no payment has been made ? I cannot say so ; and, therefore, in the absence of proof to the contrary, I recur to the observation, that the appellant will suffer no material inconvenience from the lapse of time.

The next point made was, that to allow the respondent to prove payments anterior to the contract, would be impugning the deed by parol proof ; and that, therefore, the feigned issue was immaterial ; and under this head it was contended, that the bill contains no allegations of fraud, or mistake, in the agreement itself.

The answer by the respondent's counsel to this objection, *struck me with force ; that after the party has been put to the expense of a feigned issue to ascertain the verity of disputed facts, after an acquiescence in the order for that issue, and after taking a chance to disprove the alleged facts, the appellant comes here with an ill grace to say the facts were immaterial, and the finding of the jury nugatory. I will not, however, say that the issue is conclusive on the appellant, and that he was bound to appeal from the order, or that he cannot now allege that the agreement, *ex vi termini*, precludes the proof by parol or anterior payments. This, however, I will say, that the appellant's acquiescence in the feigned issue, his controverting those payments on the trial of that issue, and especially, his not setting up, or pretending, that the precedent payments were considered at the time the written agreement was entered into, and thrown in, are leading and controlling facts to show that such payments were omitted to be noticed in the agreement, and were entitled to be deducted from the purchase-money. One thing is clear to me, that the price of the land was precisely one dollar an acre, and no more. This is evident from the agreement itself, and from the consideration

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that the appellant does not pretend that any more was given, or to be given for it ; and admitting that the respondent was to give security to that extent, when he received a conveyance, he would have been entitled to have any demands he had against the appellant and *Wisner* set off, had they subsequently sued him on that security, if he could establish the facts that the price of the land was one dollar an acre, and that he had made payments to them for which he had not been credited. A receipt for the last quarter's rent is presumptive evidence that the rent for former quarters has been paid. This presumption may be rebutted, and it may be shown that the prior quarters were not paid. So if *A.* give *B.* his bond for a sum of money, it is to be presumed that it was given for what was then due ; but it may be shown that *B.* was indebted to *A.* before, and that the bond was given upon a distinct transaction. It follows, that if the payments found by the verdict on the trial of the feigned issues, were made towards the purchase of the land, and the land was sold at one dollar an acre, those payments must be allowed, and in this respect the decree is correct.

The last objection to the decree is, that *Wisner* did not own any part of the land ; and, therefore, the payments made to him ought not to be allowed against the appellant.

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It does appear that *Wisner* paid part of the money, for the purchase, *and *pro tanto*, he was equitably interested in the land. But it is too late for the appellant to make the objection against the respondent. The appellant and *Wisner* joined in the agreement of 1787. This is a decisive answer to that objection. It was a solemn recognition, as respected the respondent, that *Wisner* was interested in the land agreed to be sold. It is also controlling evidence of the fact, that *Wisner* had a legal or an equitable interest in the subject of the contract. No man should be permitted to say to another that he has led him into an error by holding out false appearances ; but that the party deceived must, nevertheless, bear the loss resulting from that error. It makes no difference whether the payments were made to *Wisner* before or after the execution of the agreement. *Wisner*, it is admitted on all hands, died insolvent ; and who can say, if the appellant had not thus solemnly admitted *Wisner* to be interested with him in the land, that the respondent might not have indemnified himself against the loss, by getting back the money he had paid ? This the appellant has prevented, by recognizing *Wisner* as an owner of the land, and he must abide by the consequences. In every view of the case, I am satisfied that the decree ought to be affirmed, as well on principles of justice and equity, as on principles of law.

This being the unanimous opinion of the court, it was thereupon,

10th May, 1812.

ORDERED, ADJUDGED and DECREED, that the decree of the Court of Chancery be affirmed ; and that the appellant pay to the respondent one hundred and fifty dollars, for his costs and

charges, in and about his defence in this court; and that the cause be remitted to the Court of Chancery, to the end that the decree of this court may be carried into execution, &c.

Judgment of affirmance.

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***HENRY POST AND JOHN W. RUSSELL, Appellants,**
against
ANSON KIMBERLY AND THOMAS K. BRACE, Respondents.

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THE respondents filed their bill in the Court of Chancery against the appellants, on the 1st April, 1807. The bill stated that the respondents, and *Zeno Archer* and *William M' Conehey*, merchants, under the firm of *Archer & M' Conehey*, were the joint owners of the schooner *Elizabeth*; the latter being owners of three fourths, and the respondents of one fourth. In August, 1806, the *Elizabeth* was fitted out with a cargo of goods, to the amount of about 16,000 dollars, and sailed under the command of *William M. Robbins*, from New-York to *Laguira*, on the *Spanish Main*. *Archer* and *M' Conehey* purchased the cargo for themselves and the respondents; they paid for and owned three fourths, and the respondents one fourth. The *Elizabeth* arrived at *Laguira*, in September, 1806. *M' Conehey* was appointed supercargo, and arrived in the brig *Hiram*, at *Laguira*, and there took charge of the cargo of the *Elizabeth*, and having *disposed of it, invested the proceeds in coffee, to the amount of 12,629 dollars and 23 cents, with which he set sail in the *Elizabeth*, for New-York; but she was compelled, by stress of weather, to put into *Norfolk*, in *Virginia*, where she arrived the 26th October, 1806, in so injured a state as to be unable to proceed with her cargo to New-York. *M' Conehey*, as supercargo and agent for the concerned, sold the greater part of the cargo, for which he received bills of exchange, to the amount of 12,550 dollars, and transmitted them endorsed, together with seventy-two bags and five barrels of coffee, the residue of the cargo, to the appellants, who were partners in trade in New-York, under the firm of *Post & Russell*, in order that they might collect the bills and dispose of the coffee, being 9,355 pounds, worth about 2,700 dollars, for the benefit of the concerned. *M' Conehey* also paid in cash to *Cornelius Grinnell*, the agent of the appellants, two hundred dollars, part of the proceeds of the cargo, to be accounted for by the appellants to the owners of the cargo, according to their several interests therein. All the bills were accepted and paid to the appellants, or otherwise converted to their own use, so that they hold of the proceeds of the cargo 15,750 dollars, one fourth part of which the respondents claim as their own property.

A. & M. partners, owned three fourths of a vessel, and B. & K. partners, owned the one fourth; they agreed to fit her out on a voyage from New-York to *Laguira*. A. & M. purchased three fourths of the cargo, and chiefly, if not wholly, with notes lent and advanced to them by P. & R. commission merchants. B.

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& K. purchased the other fourth of the cargo, for which they paid their own money, and shipped the same on board the vessel; but it was not distinguished from the rest of the cargo by any particular marks; and the whole cargo was to be sold at *Laguira*, for the joint account and joint benefit of the owners, A. & M. and B. & K. M. went out as the supercargo and agent; and having sold the cargo at *Laguira*, he invested the proceeds in a return cargo, with which the vessel set sail for

The respondents further alleged in their bill, that after the bills of exchange and coffee were received by the appellants,

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New-York, but was obliged, by stress of weather, to put into *Norfolk*, where *M.* sold the return cargo, except a small parcel of coffee, and for the avails received bills of exchange which he endorsed and remitted, with the parcel of coffee, to *P. & R.* to whom *A. & M.* were jointly indebted, and *M.* on his private

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account, to a greater amount, for advances made at the time of the purchase of the outward cargo. *P. & R.* collected the bills and sold the coffee so remitted, and applied the same to the payment of the debts so due to them from *A. & M.*

P. & R. had notice, if not at the time of the shipment of the outward cargo, certainly before the bills remitted by *M.* were collected, and the coffee sold and converted into money, that *B. & K.* were interested in, and owned one fourth of the cargo, so sold by *M.*; and *B. & K.* demanded of *P. & R.* their proportion of the proceeds so remitted by *M.*, after de-

and before the bills became due and payable, to wit, on the 10th *February*, 1807, and often before and afterwards, verbally and in writing, they gave notice to the appellants, that they, the respondents, were separately interested in one fourth part of the proceeds of the cargo, and requested the appellants to pay to them their proportion of the same, which the appellants refused to do.

The respondents prayed that the appellants might account with, and pay over to them their proportion of the bills of exchange and coffee, or of the proceeds thereof, deducting therefrom such commissions as the appellants might be justly entitled to.

The appellants, in their answer, admitted that the respondents and *Archer & M' Conehey* owned the *Elizabeth*, as stated in the respondents' bill, but that they were not informed of the fact until after the schooner returned from *Laguira* to the *United States*; that they did not know who fitted out the schooner, or that any persons except *Archer & M' Conehey* had any interest in her cargo; that the appellants came under engagements and responsibilities, (which they have since discharged,) and made advances for *Archer & M' Conehey*, to the amount of about 12,000 dollars, *which they believed were applied to the purchase of goods shipped by *Archer & M' Conehey*, in the schooner, to *Laguira*; and that those advances were made and responsibilities incurred, by the appellants, on the promise and assurance of *Archer & M' Conehey*, that the return cargo, the avails of the property so purchased, should be deposited in the hands of the appellants, who should be paid thereout the whole amount of their advances and other debts, due by the firm of *Archer & M' Conehey* and by *M' Conehey*, in his own right, with the usual commission on the sale of such return cargo; that they should not have made the advances and incurred the responsibilities for *Archer & M' Conehey*, had they not believed that *Archer & M' Conehey* were solely interested in the adventure. They admitted that *M' Conehey* went out as supercargo, but were ignorant of any agreement between the owners of the *Elizabeth* and her cargo, on that subject; that *Cornelius Grinnell*, the agent of the appellants, purchased at *Laguira*, and shipped on board of the *Elizabeth*, one hundred and fifty quintals of coffee, consigned to the appellants, for which *M' Conehey*, as owner of the schooner, signed bills of lading, and which coffee was worth 4,000 dollars; that after the arrival of the *Elizabeth* at *Norfolk*, as stated by the respondents, the appellants received several letters from *M' Conehey* advising them of his intention to sell his property there and remit bills to the respondents. But in none of his letters did *M' Conehey*, at any time, mention any other persons except *Archer*, as having any interest in the voyage; but regrets that his remittances to the appellants were not more; that the proceedings of *M' Conehey* were known to *Archer*, who appeared to approve of them, and prior to the receiving of the bills, persuaded the appellants to make

further advances to *Archer & M' Conehey*, under the assurance that the property coming from *M' Conehey* should be received by the appellants, who might repay themselves out of it, for all their demands against the firm of *Archer & M' Conehey*, and *M' Conehey* himself, in his own right. That in November, 1806, the appellants received from *M' Conehey* the bills of exchange and seventy-two bags and five barrels of coffee; but the coffee was marked as the coffee shipped by *Grinnell* at *Laguira*, and which the appellants claimed as their property. That it was not true that the bills of exchange and coffee were sent to the appellants, with any directions, or any intimation, that the bills were to be collected, and the coffee sold by them, as agents, or for the benefit of the concerned; but that, on the contrary, the bills were *transmitted to the appellants, as principals, in their own right, and for their own benefit only, in part payment of the debts due to them from *Archer & M' Conehey*, and *William M' Conehey*; and that the coffee was received by the appellants, as part of the shipment made on their account and consigned to them, by *C. Grinnell*; and that the bills of exchange were received in payment of the residue of the coffee so shipped to them; and that the proceeds of the bills of exchange were passed to the credit of *Archer & M' Conehey*, and *William M' Conehey*. That one hundred and seventy, not two hundred dollars, part of the proceeds, were paid to *C. Grinnell*, by *M' Conehey*, not for the purpose of being accounted for by the appellants, as stated in the respondents' bill, but in part payment of the said debts due to the appellants; that the whole amount of the bills and coffee, so received by the appellants, including the sum of one hundred and seventy dollars, was 14,024 dollars and 25 cents; and they denied that any part of it was the sole property of the respondents, but, as it appeared from the appellants' own statement, was an undivided partnership concern with *Archer & M' Conehey*. The appellants admitted, that after the bills and coffee came to their hands, but not before they had received and accepted the same, and had passed the same, or so much as did not belong to them, to the credit of *Archer & M' Conehey*, and of *William M' Conehey, Kimberly*, one of the respondents, called on them, and alleged that the respondents were interested in one fourth of the proceeds of the cargo, but they did not recollect that he asserted such interest to be separate and distinct from that of *Archer & M' Conehey*. The appellants admitted that they were requested by the respondents to account to them for their proportion, which they refused to do, believing that they had a good right to hold and apply the property to the payment of the debts due to them from *Archer & M' Conehey* and *William M' Conehey*.

A general replication was filed to the answer of the appellants.

William M' Conehey, who was a witness for the respondent, testified that in August, 1806, the *Elizabeth* was fitted out with a cargo for *Laguira*; that himself and *Zeno Archer*, un-

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ducting commissions, &c. but *P. & R.* refused to pay or deliver the same, alleging their right to retain the same, for the payment of the

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debt due to them from *A. & M.*

It was held, that there was no partnership existing between *A. & M.* and *B. & K.*, so as to render the disposition of the return cargo, by *M.* binding, as the act of a partner, on *B. & K.* That there was no agreement constituting a partnership, in the purchase of the outward cargo, or to share jointly in the ultimate profit and loss of the adventure: and though there might be a partnership, so far as respected the transportation and selling of the outward cargo, for the joint profit and loss of the owners; yet it terminated with the sale of the outward cargo; and their interest in the return cargo was separate and distinct, each being entitled to his respective proportion of it, without any concern in the profit or loss which might ultimately arise; and

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that *P. & K.* not having received the bills in the course of trade, and knowing of the interest of *B. & K.* before the bills were paid, had no right to retain their share, for the payment of the debt of *A. & M.* but must account to *B. & K.* for their proportion:

And that a bill for a discovery and account by them against *P. & R.* was sustainable in the Court of Chancery; that court having a concurrent jurisdiction with the courts of law in all matters of account.

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(a) Vide *Duncan v. Lyon*, 2 Johns. Ch. Rep. 351. 361. *Hutwiley v. Cramer*, 4 Cowen, 717.

der the firm of *Archer & M' Conehey*, were joint owners of three fourths of the cargo, and that the respondents were separately interested in, and owners of, one fourth thereof; that when the witness was about purchasing the cargo, he told the appellants that the respondents were to be so interested; that the respondents themselves purchased and paid for their said proportion, consisting chiefly of brandy; *and that *Archer & M' Conehey* purchased the other three fourths; that the goods composing the outward cargo were not distinguished by particular marks, designating to whom they belonged; nor was there any writing, other than invoices and bills of lading, specifying the different articles belonging to the different owners. He proved the sailing to *Laguira*, his going there as supercargo and agent for the several owners; the sale of the cargo there, the purchase of a return cargo, and the vessel's being driven into *Norfolk*, the sale there, and that the proceeds, and the seventy-two bags and five barrels of coffee, were transmitted to the appellants for the benefit of the persons concerned, but he did not consider the appellants as the agents of the respondents; that the cargo was not sent to *Laguira*, as partnership property, the owners being only interested in the profit and loss, according to their respective proportions of the property; but that the respondents were separately and distinctly interested in, and owners of, the one fourth part of the outward and return cargoes; and whenever the respondents had exceeded their proportional part of the disbursements for the outfits of the schooner, the remainder was not charged by them to the schooner, but to *Archer & M' Conehey* in account; that the funds for the purchase of the three fourths were derived from the endorsements of the appellants, though 3,000 dollars were advanced by *Archer & M' Conehey* to the appellants; that in order for the appellants to make the endorsements and advances, the witness assured them that they should be reimbursed out of the said cargo; but he said nothing to them about commissions, or any debt due from him individually, or from *Archer & M' Conehey*; and that at the time of purchasing the cargo, he told *J. W. Russell*, one of the appellants, that the respondents were interested in one fourth part of the cargo, and had the same on board, and that *Archer & M' Conehey* would not want endorsements for more than their proportion. That *Cornelius Grinnell* did not ship any coffee in the schooner at *Laguira*, but having a claim on the witness, which was to be satisfied out of the property on board of the *Hiram*, as well as that on board of the schooner, the witness, in order to secure *Grinnell*, by enabling him to make insurance on property sufficient to cover his claim, signed a bill of lading for one hundred and fifty quintals of coffee, on condition, however, that in case the cargoes arrived safe, the bill of lading should be void. That the bills of exchange and coffee were remitted by the witness to the appellants; that *Archer & M' Conehey* *were indebted to them at that time; though he did not know to what amount; but that he never intended that the part or

proportion of the respondents should be applied to the reimbursement or repayment of the appellants; that he had no recollection of mentioning in any of his letters the application of the remittances; but as the appellants had made advances, he did not wish to keep the proceeds out of their hands; and meant to deposit them with the appellants, until he could come to *New-York* and make the necessary arrangements as to the appropriation of the three fourths.

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Zeno Archer deposed that, in *August*, 1806, when the *Elizabeth* was fitted out for *Laguira*, he told *Russell*, one of the appellants, that the respondents were owners of one fourth part of the vessel and cargo; and he and his partner, *M' Conehey*, owned three fourths, which fact he believed was also known to the other appellant; that the witness negotiated and made the purchases for the outward cargo; that the respondents gave their notes for the one fourth part thereof, which were all paid; and that the respondents were interested in, and owners of, one fourth part of the outward and homeward cargo, and of the proceeds and avails thereof, separately and distinctly from *Archer & M' Conehey*. On his cross-examination, he said that there was no division made of the articles composing the outward cargo, so as to specify the particular parts belonging to each of the parties concerned; that the articles purchased with the notes of the respondents were wines and brandies; but that the respondents were to share in the net proceeds of the whole cargo; that the cargo was sent to *Laguira* as a partnership property, in which the parties had an undivided interest, as to profit and loss, according to their respective proportions above-mentioned. That in order to induce the appellants to make advances by giving their notes, *Archer & M' Conehey* assured them that they should be paid and satisfied, as soon as *Archer & M' Conehey* should be in funds from the proceeds of the cargo; and that he knew of no other promises or assurances made to the appellants, nor whether his partner owed them on his individual account.

The captain of the *Elizabeth* testified, that he believed the appellants were well acquainted with the respondents being interested in the vessel and cargo, as *Archer* had been doing business with the appellants; and *Cornelius Grinnell*, who was then a clerk of the appellants, was well acquainted with the circumstance.

*That there was a bill of lading for coffee, signed and delivered to *C. Grinnell*, at *Laguira*, by *M' Conehey*, or himself, which coffee was part of the proceeds of the outward cargo of the *Elizabeth*; that the bill of lading was given by *M' Conehey* with some reluctance; *Grinnell* had previously said that *M' Conehey* had deceived him, and they should sink on the *Hiram's* cargo; and after the bill of lading was given, *M' Conehey* told the witness he had now made *Grinnell* safe, or words to that effect.

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Grinnell, who was a witness for the appellants, deposed that he was one third interested in the *Hiram's* cargo; that the

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appellants made the advances and engagements for *Archer & M' Conehey* for the purchase of the *Elizabeth's* cargo; and that they were induced to do so, in consequence of the agreement of *Archer & M' Conehey*, that the appellants should receive a commission of two and a half *per cent.* on the amount of the advances, and that the return cargo should be placed in their hands to be sold, and, out of the proceeds, they were to reimburse themselves for their advances, and retain a farther commission of two and a half *per cent.* That the witness, as agent of the appellants, purchased at *Laguira*, on the joint account of the appellants, *Archer & M' Conehey* and himself, one hundred and fifty-two quintals of coffee, which he shipped on board of the *Elizabeth*, and for which *M' Conehey* signed a bill of lading, which was produced, and was in the usual form. On his cross-examination, he said, that he got this parcel of coffee of *M' Conehey*, in order to make good some sacrifice which had been made in the disposition of the *Hiram's* cargo. After the arrival of the *Elizabeth* at *Norfolk*, the witness, at the instance of *Archer*, went to *Norfolk*, the better to collect the sales of the cargo, in order to pay the appellants; that when he arrived there *M' Conehey* informed him of his having already remitted to the appellants 8,500 dollars, and seventy-two bags and five barrels of coffee, and that he should be able to pay the witness 6,000 dollars in cash, which would nearly satisfy the appellants for their advances, &c.

That *M' Conehey*, afterwards, paid the witness about 3,900 dollars, on that account, and that in all his conversations with *M' Conehey*, there was nothing said by the latter about applying the remittances and payments to any other person than the appellants; and that the first time that the witness heard that the respondents were interested in the cargo of the *Elizabeth*, was some time after his return from *Norfolk* to *New-York*, in *December*, 1806; that *M' Conehey* to secure the balance due to the appellants, while at *Norfolk*, transferred three eighths of the *Elizabeth* to them, and *Archer* afterwards made a similar transfer of his three eighths. That *Archer* expressed his satisfaction at the remittances made to the appellants, but did not suggest that any other person but himself and *M' Conehey* was interested in the cargo of the *Elizabeth*, or in the avails of the return cargo; but on the contrary, when *Archer & M' Conehey* spoke of the adventure, they always mentioned it as their own.

Several letters were produced by the appellants, written to them by *M' Conehey* from *Norfolk*. One, dated the 27th of *October*, 1806, mentioned his arrival there, that he had much to communicate by the first opportunity, and that the *Hiram* was to sail ten days after the *Elizabeth*. The letter, dated 1st of *November*, mentioned his having informed the appellants of his arrival, and had since particularly communicated the transactions of his last unfortunate voyage, to which he referred the appellants, being then too much indisposed to write more. The letter referred to, as containing the particulars of the transactions by *M' Conehey*, was not produced by the appellants.

In his subsequent letters, he spoke of the remittances of two bills of exchange, and the seventy-two bags and five barrels of coffee; expressed his surprise at the arrival and mission of *Grinnell, &c.* but the further contents of these letters seem not to be important.

The cause was heard in *May*, 1810, and on the 15th of *September*, the chancellor decreed, "that the appellants should pay to the respondents one fourth of the net proceeds of the return cargo of the *Elizabeth*, on her voyage from *Laguira* to *New-York*, and that it should be referred to one of the masters of the Court of Chancery to take an account between the parties, in which he should charge the appellants with the amount of one fourth of the sums which came to their hands in cash remitted from *Norfolk*, and such sums as were received by them on the sale of the coffee, part of the said return cargo, remitted to them in specie from *Norfolk*, with interest, and crediting them with all reasonable charges, disbursements and commissions."

The master having reported that there was due from the appellants to the respondents the sum of 4,835 dollars and 97 cents, the chancellor, on the 14th of *December*, 1812, confirmed the report, and ordered and decreed that the appellants should pay the sum so reported to be due, to the respondents, with costs.

From this decree an appeal was entered to this court.

*The *reasons* for the decree were thus assigned by

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THE CHANCELLOR. It has not been doubted that the respondents were originally concerned in the outfit of the schooner *Elizabeth*, on her voyage from *New-York* to *Laguira*. That the outward cargo was purchased, and laid in by distinct purchases of wine and brandy, by the respondents, to the amount of one fourth; and of wine and dry goods, by *Archer & M' Conehey*, to the amount of three fourths; that such outward cargo was carried to *Laguira*, there disposed of, and converted into coffee, the coffee partly sold at *Norfolk*, and partly remitted, in specie, with the proceeds of the sales to the appellants, were facts fully established by the pleadings and testimony; and there was no point presented for decision, as to the property of the remaining three fourths of the cargo. This narrowed the ground of controversy, and presented it in a less complicated point of view, than the mass of evidence and argument which had been connected with it, in its progress, seemed to admit of.

The appellants did not deny that they were in possession of the proceeds of the return cargo; but they alleged,

1. That they made certain advances, and incurred certain responsibilities, on the credit of the whole cargo, in consequence of an engagement with *Archer & M' Conehey*.

2. That the remittance of the return cargo was made to the appellants, without any reference to the rights of the respondents.

3. That notice was not given of the respondents' concern in the cargo, till after the return cargo was received.

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The advances and responsibilities may be considered under two aspects.

1. As having been made with notice of the interest of the respondents.

2. As without it.

There was no pretence that the firm, *eo nomine*, had done any act to bind its interest collectively. The question was, whether one of the parties to the firm, without any reference to it, either directly or indirectly, or professing to dispose of its interests, could bind those interests?

If the advances and responsibilities for which an indemnity is sought by the appellants, by making them available to this defence, were made on the credit of the interests of *Archer & M' Conehey* in the cargo, and if, instead of a general ownership, a *partial one, either distinct or combined with the rights of others, was all they were entitled to, it is evident that nothing could pass by the act merely, limited to give that credit effect, but the rights possessed by *Archer & M' Conehey*. The appellants alleged that they knew not the respondents in the transaction, and that they had no interest in it. It followed, of course, that if they had an interest, it was not the object of the agreement made between them, and thus the only property which could be affected by it was that of *Archer & M' Conehey*; for the contracting parties either not knowing or concealing the existence of the interests of the respondents, could not possibly profess to bind it.

There was no right of disposition exerted by one, avowedly as part of a commercial firm, and it was not a question how far a partner exerting his right of disposition absolutely, is legally restrained in his acts. This depended upon an executory contract, in its form totally disregarding the interests of the respondents; and I know no rule of construction which could possibly justify intendments that the contract embraced a partnership property in which the respondents were interested, and hence it could not be legally or equitably inferred that *Archer & M' Conehey* did not limit their contract to their own rights only, as distinct from any copartnership which might arise out of the manner of conducting their adventure. If this transaction assumed the complexion in which it was presented to the court with full notice of the rights of the respondents, it is evident they were not intended to be bound. If they had no notice, it is equally clear that the reliance of the appellants was exclusively placed on the property of *Archer & M' Conehey*, and that the right of the latter must inevitably limit those of the former.

This appeared to me to conclude forcibly against the defence; but as I considered the second point equally untenable as a ground of defence, it may be proper to state the view taken of that also.

The appellants alleged in their answer, as respected this point, *matter of avoidance*, which, as the replication put it in issue, it was incumbent on them to support *aliunde*. They

have given no evidence that the remittances to them were made in reference to, or as connected with, any exclusive rights to the cargo. On the contrary, *Archer & M' Conehey* (whose testimony was, however, questioned) proved that the appellant, *Russell*, was informed, at the time of the sailing of the schooner, of the interest of the respondents *in her cargo. *M' Conehey* stated that both the appellants possessed the same information; and *Grimmell* expressly stated that an agreement was made between the appellants and *Archer & M' Conehey*, that the appellants should receive two and a half *per cent.*, not on the cargo generally, but on account of their advances, and that he purchased the one hundred and fifty-two quintals of coffee, *as agent for the appellants*, but on their account and that of *Archer & M' Conehey*.

In the letters written to the appellants by *M' Conehey*, he says not a word as to the application of the remittance to the exclusive benefit of the appellants. He is entirely silent on the subject. If, however, he had clearly expressed his intent so to apply it, that, of itself, could neither control or impair the rights of the respondents, for he was agent for the appellants, and if he had been agent for both parties intrusted to dispose of the cargo, it would not make the appellants' case better.

There are some intrinsic circumstances which have a bearing on the point of notice. It appears that the outfit for the voyage to *Laguira* was made at the port of *New-York* where the appellants resided: that the proportion of *Archer & M' Conehey* was furnished by the appellants, either in the specific articles of which it was composed, or on their credit; that they were vigilant and attentive to their interest, was, I thought, deducible from the evidence, and hence, as the outfit was made under their eye, it would seem improbable that the mode of furnishing the one part of the cargo by the respondents, could have escaped their most superficial observation. If they had the least intimation of that interest, while in the act of providing the cargo, and they exacted an engagement from *Archer & M' Conehey* to subject the articles purchased by the respondents to an indemnity for their advances, it seemed to me the duty as to notice would have been inverted, and that good faith required that the appellants should apprize the respondents of the agreement intended to affect their interest.

The question of partnership I did not think it necessary to examine, being of opinion that whether there was a partnership or not, the appellants must account and pay over to the respondents the net proceeds of the return cargo.

In support of their appeal the appellants stated that they should insist:

1. That *Archer & M' Conehey* and the respondents were *partners in the outward and return cargoes* of the *Elizabeth*, as evidently appeared, as well from the manner of laying in the outward cargo, as from the circumstance that they participated in the profit *and loss of the entire adventure, in proportion to their respective interests, and were *not severally and distinct-*

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ly to reap the profit and sustain the loss arising from those particular parts of the outward cargo, which they respectively paid for.

2. That the appellants had made advances, and incurred responsibilities, for the purchase of the outward cargo, under the express stipulation of *Archer & M' Conehey*, the partners of the respondents, that the appellants should be reimbursed out of the avails of the property purchased with their money, and in the profits whereof the respondents were to participate.

3. That *Archer & M' Conehey*, after the sailing of the *Elizabeth*, reiterated their assurances, that the appellants should be reimbursed out of the proceeds of the outward cargo; that the return cargo should be consigned to them for that purpose, and that they should be allowed the customary commissions on the sale thereof, and, by that means, induced the appellants to make further advances, and incur further responsibilities, which, but for those assurances, they would not have made or incurred.

4. That the property remitted to the appellants from *Norfolk*, by *William M' Conehey*, the acting partner, who had the entire management of the business, was remitted by him in good faith, and in strict compliance with the stipulation entered into by him and one of his copartners, with the appellants, who, on the faith thereof, had expended large sums of money for the benefit of the whole concern, and with the terms whereof all the parties, who might eventually have been benefited thereby, ought in honor as well as in equity, to have complied.

5. That the remittances, although made with the honest intent of performing the engagements made with the appellants, were wholly inadequate to extinguish their claims, to the extinguishment whereof they were pledged.

6. That the property remitted in specie from *Norfolk*, as well as a considerable proportion of the bills, belonged to the appellants as their property, distinct from any claim of the respondents, inasmuch as it was purchased for them, by their agent at *Laguira*, in consideration of the relinquishment of a part of their profits, in the adventure of the *Hiram*, for the benefit of the parties concerned in the *Elizabeth*.

7. That considering the appellants as the agents or factors of the respondents and *Archer & M' Conehey*, yet, when the remittances were made to them by *M' Conehey*, there was a general *balance of accounts due to the appellants from *Archer & M' Conehey* exceeding the whole amount of those remittances, and yet unsatisfied; and that they are entitled to retain the funds remitted to them, in part payment of that balance.

8. That laying out of view the fact of partnership, *M' Conehey* was the agent of all the parties concerned in the adventure of the *Elizabeth*, and, as such agent and a part owner, he had the absolute disposal thereof; and that the respondents are bound by his appropriation thereof to the payment of a *bona fide* debt

due from himself and *Archer & M' Conehey* to the appellants; and if they have been wronged, they must seek for redress against him. The property in controversy must be lost by one party or the other, and there can be no reason why the appellants, who have had the good fortune to receive it, should be deprived thereof rather than the respondents, who retained *M' Conehey* as their agent.

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9. That the remittances were principally in *bills of exchange*, which are to be considered as *cash payments*, and the appellants, consequently, no more liable, as far as respects those bills, than they would have been, had *M' Conehey* paid them the amount of their demand in money.

In support of the decree, the respondents stated that they should insist:

1. That they were the owners of the fourth of the *Elizabeth* and cargo, and had paid for the fourth of the cargo, and also had paid for the insurance of the vessel and cargo.

2. That the appellants were informed, *at the time* of the shipment of the said cargo, of the interest of the respondents therein.

3. That the appellants were informed of the interest of the respondents in the cargo after the shipment, and before any of the bills of exchange were paid or payable, and before the said coffee was sold and paid for.

4. That the cargo at *Laguira* was purchased with the proceeds of the cargo shipped at *New-York*, and *with no other funds*.

5. That the whole of the homeward cargo was received by the appellants, for the benefit of those to whom it belonged, in coffee, money, and bills of exchange.

6. That the bill of lading signed by *M' Conehey* is void, and if not void, cannot affect the interest of the respondents.

7. That the respondents are entitled to one fourth at least of all the property received by the appellants, and being a part of the proceeds of the outward or homeward cargo of the *Elizabeth*.

*8. That the principles assumed by the appellants in vindication of their conduct, in retaining the whole of the said property for alleged claims against *Archer & M' Conehey*, and *M' Conehey* alone, are either inadmissible or inapplicable to a case circumstanced like the one before the court.

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Hoffman, for the appellants. The common and well known principles of the law of partnership, and of the law as to the duties and responsibilities of agents, are applicable to this case. The respondents were jointly interested in the advances and purchases, for the outward cargo, and were to share in the profits of the adventure. They were so jointly interested at the commencement of the enterprise. This is a controlling fact, and must be decisive in the cause. This was a limited partnership, as it regarded the specific purpose or enterprise, but general, *quoad* that adventure or voyage. The equity of the bill is placed by the respondents, on its being a joint ad-

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venture. The testimony of *Archer* is conclusive as to the fact that the property was sent to *Laguira* as a joint or partnership interest. Suppose the wines and brandy purchased with the money of the respondents had found a *losing* market, and the goods of the appellants had sold at a *profit*, on the principle of the chancellor's decree, not only the advances of the appellants, but a proportion of the profits would be given to the respondents. This is not a case where each party contributes his *aliquot* part to an adventure. The appellants made advances for the purchase of the whole cargo, not knowing that the respondents had any share in it. The fund has been benefited by these advances. Suppose, then, there was not a strictly legal partnership, will a court of *equity* take this fund out of the hands of the appellants, where it has been placed by an authorized agent for their security? The appellants and respondents may be considered as both *bona fide* creditors of *Archer & M' Conehey*, and their equity being equal, the party having the legal right is to be preferred. Where one *bona fide* creditor is in possession, a court of equity will not take the property from him and give it to another creditor. There can be no apportionment in this case. The whole property was pledged to the appellants by the agent or partner of the respondents, or none. If the respondents have the legal right, let them seek their legal remedy. A court of equity will not interfere.

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*Again, there is no allegation in the bill that any notice was given to the appellants that the respondents were interested, until after the bills of exchange and coffee had been received by the appellants. The bill must set forth with precision the matter on which the equity of the claim is founded. This is a technical and unanswerable objection. The complainants must be confined to the case as stated in their own bill. A person receiving property, or papers, *bona fide*, without notice of the interest of a third person, is not to be disturbed in his possession of that property. The appellants were regular commission merchants, and it is not credible that they would have made advances to the amount of 12,000 dollars, without an adequate commission or profit.

Again, *M' Conehey* had a right to sell the cargo at *Norfolk*, and having sold it, he remitted to the appellants, for a part of the proceeds, bills of exchange payable to himself, and endorsed by him to the appellants, to pay them for the debts due to them from *Archer & M' Conehey*. The appellants were then *bona fide* holders of these bills, for a valuable consideration, and without notice of the interest of the respondents. Shall a third person behind the curtain, and who has his legal remedy against *M' Conehey*, now step forward, and prevail against the holders of these bills in equity? Such a decision would be against the established principles relative to negotiable paper.

Baldwin and Riggs, contra. By the testimony of *Archer*, as well as that of *M' Conehey*, it is clearly proved that the respondents purchased, with their own money, one fourth of the

cargo put on board the *Elizabeth*; and it appears from the same testimony, that the appellants, or, at least, one of them, had notice of the fact, at the time the shipment was made. The bill states, that "on the 10th of *February*, 1807, and often before and after, by writing and verbally, the respondents informed the appellants of their interest," &c. The answer denied the knowledge of the fact prior to receiving the bills; and the replication put that fact in issue. The respondents may, therefore, avail themselves of the facts in proof on that subject.

It is a rule of the Court of Chancery that the cause is put at issue by a general replication. (*Rules of Chanc.* 31. *Mitf. Pl.* 255. *Cooper's Eq. Pl.* 330.) The fact, therefore, as to the time of the notice is put in issue, and must be determined by the proofs. It was not necessary that the bill should charge a notice. The appellants, in their answer, set up the want of notice as essential to make out their title to the bills of exchange. Their defence rests on the fact of a purchase made without notice. But there is a sufficient averment in the bill of a notice; the respondents would not, even by the strict rule of pleading, at law, be obliged to show the exact day. The general allegation was sufficient. In *James v. M'Kernon*, (6 *Johns. Rep.* 543,) the fraud was not put in issue; but merely the execution of the contract. Here the appellants aver, and are bound to prove, a want of notice, and the fact was put in issue; and by their cross interrogatories they did go into the proof of want of notice.

It is said that the remedy of the respondents is at law. But one partner cannot sue his copartner at law, until a settlement of accounts and a balance struck between them. All matters of account are properly cognisable in a court of equity. Besides, there is an allegation of fraud in the bill, and that is a proper subject for the cognisance of a court of equity.

Holmes v. The United Insurance Company (2 *Johns. Cas.* 329) is a strong case in point, to show that there was no partnership between the respondent and *Archer & M'Conehey*. There must be an agreement between the parties to constitute a partnership. There was no agreement in this case, even to make a joint purchase. In fact, the parties purchased separately. Persons may be joint owners, without being partners. One partner cannot apply the partnership funds, or use the partnership name, for his private debts. (2 *Caines' Rep.* 246. 1 *Johns. Cas.* 171. 4 *Johns. Rep.* 251. 7 *East*, 210. 1 *East*. 48.)

M'Conehey, as the agent of the respondents, could not bind them beyond the scope of his agency. The attempt by *M'Conehey* to make use of the property of the respondents, to pay his own debt, was a fraud; and it was also a fraud in the appellants, after notice of its being the property of the respondents, to apply to that purpose. The bills of exchange were not received by the appellants, in the course of trade, for merchandise sold; nor did they make any advances on the credit

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of those bills. *M' Conehey* was the *agent*, *supercargo*, or *factor* of the respondents, in respect to the cargo, and the appellants dealt with him in that character. As it respected that property, he was not a merchant; and being a *factor* he had no authority to pledge the property of his principal for his own debt. (5 *Ves.* jun. 21.) As long as the property is in specie, whether in the form of bills of exchange, promissory notes, or in any other shape, so that ● can be identified, *the principal has a right to pursue it in the hands of others. The owner's claim must prevail against creditors. (2 *Vern.* 638. 1 *Atk.* 232. 234. 2 *Atk.* 623. 5 *Term. Rep.* 226, 227. *Stra.* 1178. *Term. Rep.* 606. 1 *P. Wms.* 314. 3 *P. Wms.* 185—187. 1 *Atk.* 185. *Amb.* 297. *Salk.* 160. 3 *Term. Rep.* 757. 760.)

Again, if the appellants had issued an execution for the amount of their debt, against *Archer & M' Conehey*, on the principle of a copartnership existing between them and the respondents, the *surplus* only belonging to *Archer & M' Conehey*, after a settlement of the partnership accounts, could be taken on the execution, to pay the separate debt of one of the partners. This is the rule in chancery, (4 *Ves.* 396,) and it has been recognised and adopted by the Supreme Court. (2 *Johns. Rep.* 280.)

T. A. Emmet, in reply, said, that the complainant must always stand on the *equity of his own bill*. There is no allegation in the bill of a *notice* of the respondents' interest, at the time of the shipment. The replication put in issue nothing but the facts alleged in the bill, and denied or avoided by the answer. It is true, where a day is alleged under a *videlicet*, it may be proved to be any other time, provided it is not inconsistent with the equity of the bill.

If the respondents were partners, the fact of notice was immaterial. Notice after the shipment could avail nothing; but the fact of notice was not put in issue; the proof ought not, therefore, to be considered.

The respondents though they had documentary evidence of the value of the outward cargo, have not produced it, but have left the court to grope in ignorance on the subject. The appellants have not been paid the amount of their advances for the purchase of the cargo; there will be at least one hundred dollars due to them, after deducting all they have received from *Archer & M' Conehey*.

The partnership between *Archer & M' Conehey* and the respondents, commenced with the purchase of the cargo. The purchases were made in gross by *Archer & M' Conehey*. It was sent undivided to *Laguira*, and sold together on joint account, and the parties were jointly to share the profit or loss. This case is different from that of *Saville v. Robertson and another*; (4 *Term. Rep.* 720;) there each party bought his own particular stock, and, afterwards, they made a joint adventure of the whole. The *copper* for sheathing was admitted to be a joint concern of all the parties; and had all the pro-

perty been purchased in the same manner, all the parties would have been liable as partners. Could not the persons of whom the outward cargo was purchased have maintained an action against the respondents and *Archer & M' Conehey*, for the amount? Here was a community of goods, without marks or distinction, and a community of the profit and loss, which constitutes a partnership. If a partner or joint owner acts as a supercargo or agent, he does not thereby lose his character as owner. He still retains his right to a share in the profits, with an additional compensation for his extra trouble. His acts, therefore, as regards third persons, are to be considered as those of a partner, and as such must bind his copartners.

The return cargo when it arrived at *Norfolk* was still undivided. It was sold by *M' Conehey* and converted into money, with which bills of exchange were purchased and sent to the appellants expressly to pay them the amount they had advanced. It is absurd to suppose that the original owner, in such a case, could procure his coffee, after it had been converted into money. *M' Conehey*, in his answers, as a witness, has given three different accounts of the object of the remittance, but his letters clearly shew that they were not remitted for the benefit of all concerned, but specifically to pay the appellants. It was remitted to pay a just debt. This is not a struggle between creditors; but between a creditor and a debtor. If the respondents are partners, then the whole debts of the concern must be paid, before they can claim their proportion of the proceeds. Admitting even that the appellants had received the bills as agents for the concern, they would have a lien upon them, and might retain them until their accounts with the concern were settled and paid. The respondents have a remedy at law. They might maintain an action for money had and received for their use, if their demand be just. If it was a partnership transaction, then *Archer* and *M' Conehey* and *Grinnell* ought to have been made parties.

The allegation of fraud in this case, is the same as in a common action of *assumpsit* at law.

YATES, J. not having heard the argument of the cause, gave no opinion.

VAN NESS, J. was of opinion that the decree of the Court of Chancery ought to be *affirmed*, and gave his reasons.

THOMPSON, J. The rights of the parties in this case have been considered as depending principally upon the question of *partnership between *Kimberly & Brace* and *Archer & M' Conehey*. The appellants cannot, either on principles of law or equity, resist the decree against them, without establishing such partnership. It cannot, in my opinion, with any plausibility, be contended that the respondents and *Archer & M' Conehey* were, as between *themselves*, partners in the purchase of the outward cargo of the *Elizabeth*. For a partnership is a voluntary *contract* between two or more persons, for joining together their money, goods, or labor, &c. upon some agreement respecting them. It is therefore a relation between parties created by

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contract, and as it respects their relative rights among themselves, must depend upon the terms of such contract. There is in this case not only the want of any positive proof of such agreement, but the door is shut against every presumption of its existence, by direct proof to the contrary. *Archer & M' Conehey* both testify that *Kimberly & Brace* were owners of one fourth part of the cargo *separately* and *distinctly* from the other three fourths owned by themselves. Whatever concern, if any, they had in the purchase, was in the character of agents. The payment for the one fourth was made by *Kimberly & Brace* on their own separate account. In addition to which, it is also proved that *Kimberly* refused to purchase, or become responsible for any part of *Archer & M' Conehey's* proportion. Such a concern, in no respect whatever, partakes of the nature of a partnership. Each house was to purchase and put on board the *Elizabeth* its aliquot part, without the concern or responsibility of the other. Suppose one or more of the pipes of brandy purchased by *Kimberly & Brace* had sprung a leak or been lost, in the transportation from the storehouse to the schooner, no part of the loss would have fallen upon *Archer & M' Conehey*. There was, at all events, no joint risk, until the goods were on board the schooner. The language of Lord *Kenyon*, in the case of *Sheriff v. Wilkes*, (1 *East*, 51,) may with peculiar force be applied here: "That it is hard enough for one partner, in any case, to be able to bind another without his knowledge and consent, but it would be carrying the liability of partners for each other's acts to a most unjust," and, I would add, alarming extent, to consider transactions like this as creating a partnership.

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This case is very analogous to that of *Saville v. Robertson and another*, (4 *Term. Rep.* 720,) where several persons, who had no general partnership, nor any connection with each other in trade, formed an adventure to the *East Indies*; each one to bring in his *own share, and it was held not to be a partnership as to the *purchase* of the goods, so brought into the adventure. It was likened to the case of several persons agreeing to enter into partnership, each bringing in a stipulated sum of money, and each borrowing his proportion of different persons, in which case it would be impossible to say that the persons advancing the money could maintain actions against all the partners for the several proportions lent to each.

It may, however, be necessary to inquire, whether *Kimberly & Brace* have so conducted themselves as to become responsible to the appellants for the part of the cargo furnished by *Archer & M' Conehey*. For if not, I am not aware of any principles of law or equity that will authorize them to apply the property of *Kimberly & Brace* to the payment of their demand against *Archer & M' Conehey*. It is, unquestionably, a settled rule of law, that although with respect to each other persons may so limit their engagement, as not to be regarded in law as partners, yet, as to their transactions with the rest of the world, they may be liable to be charged as such, if they

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have permitted such other persons to use their credit, or hold them out to the world as jointly liable; otherwise great frauds and impositions might be practised. This rule of law, however, is for the protection and security of those who are ignorant of the true relation in which persons with whom they deal may stand to others, more or less concerned with them. For where a partnership is a limited one, and confined to a particular business or transaction, and persons who deal with it know it to be such, the partnership is not bound beyond the terms of it, by the act of one partner in relation to his own private concerns. This principle has been recognized by the Supreme Court, in a variety of cases, and is undoubtedly the settled rule of law. (2 *Johns. Rep.* 300. 4 *Johns. Rep.* 251.) In this view of the case, it becomes a fit subject of inquiry, how far the appellants were apprised of the concern which *Kimberly & Brace* had with *Archer & M' Conehey* in this adventure.

But here an objection is raised, *in limine* to the admissibility of any evidence on this subject, because it is not alleged in the respondents' bill in chancery. It would, I think, be a sufficient answer, that no objection to this testimony was made in the court below. Both parties have examined witnesses to that point. But independent of this consideration, no allegation of notice was necessary in the bill. The bill alleges that the respondents were *separately* interested in, and owners of, one fourth part of the adventure or cargo. This the appellants deny and insist that it was a partnership concern with *Archer & M' Conehey*; but allege that they did not know that any person besides *Archer & M' Conehey* had any interest in the adventure. This is matter, then, set up in the answer; and the truth or falsity of it may be inquired into, as matter of fact, precisely within the rule laid down, by Mr. Justice *Spencer*, in the case of *James v. M' Kernon*. (6 *Johns. Rep.* 559.) He says it makes no difference whether a defendant has, by way of avoidance, set up a distinct and independent fact, or merely denied the matter in the bill. If the existence and verity of the fact, thus set up by the defendant, be controverted, the defendant must prove it, *and the complainant may examine witnesses to disprove it*. But the fact being made out by the defendant, the complainant could not impeach it, on the ground of fraud, if not charged in his bill. If the proof as to the notice was admissible, the fact appears to be established by *Archer & M' Conehey*.

Archer says the respondents were interested in, and owners of, one fourth part of the outward and return cargo, and of the proceeds and avails thereof, *separately* and *distinctly* from *Archer & M' Conehey*; and that at the time of the shipment to *Laguira*, he informed *Russell* that the respondents were interested in one fourth part of the schooner and cargo; and he thinks it was known to *Post*, but is not certain on that point. *M' Conehey* says the respondents were *separately* interested in, and owners of, one fourth of the vessel and cargo; and that when he was about purchasing the cargo, for the

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schooner, in *New-York*, he informed the appellants that they were, or were to be, *so interested*. The credit of these witnesses has been examined into, and fully established. It must, therefore, be considered as proved that the appellants knew, at the time of the shipment, of the interest of the respondents in the adventure; and if they are chargeable with knowledge of the special and limited nature of the respondents' interest and concern, there can be no possible grounds, according to the doctrine contained in the cases already cited, upon which the respondents can be made liable for the advances to *Archer & M' Conehey*, to purchase their proportion of the cargo.

The conduct of the appellants throughout shows that they did not consider *Kimberly & Brace* responsible to them. If there was a partnership between *Archer & M' Conehey* and the respondents, in any part of this adventure, it was in the outward cargo only; and that partnership commencing with the shipment on *board the *Elizabeth*. And I am inclined to think, that thus far they are to be considered partners. They thus became jointly interested in the cargo, in proportion to their respective shares. A loss of any part of it, during the voyage, must have been borne by them at the same rate, and they were jointly interested, in the like proportion, in the profit or loss, on the sales at *Laguira*. This view of the subject reconciles what might otherwise appear to be an inconsistency in the testimony of *Archer*, who, though he swears that the interest of the respondents in the proceeds and avails of the cargo, was *separate* and *distinct* from that of *Archer & M' Conehey*, yet that the cargo was *sent* to *Laguira* as partnership property, in which the parties had an undivided interest, as to profit and loss, according to their respective proportions of interest, before mentioned. But this partnership did not extend to the return cargo. A partnership being matter of contract between parties, they may limit and modify it at pleasure. There is, therefore, no incongruity in admitting a partnership in the outward cargo, and not in the return cargo, if such was the agreement of the parties, or the necessary inference of law, from the facts proved. It is true that the proceeds of the outward cargo was to be invested in a return cargo. But there was no agreement to share in profit or loss, on the return cargo; nor any provision for a joint sale on its arrival in *New-York*. It is, necessarily, therefore, to be inferred, that each party was to take his share of the coffee, and dispose of it at pleasure, without any community of interest, as to profit or loss. Here, then, was the want of one of the most essential requisites of a partnership. For a joint concern in the *future sale* is necessary to constitute a partnership, otherwise there is no communion of profit and loss. This was the principle which governed the decision in the case of *Coope and others v. Eyre and others*. (1 H. Bl. 48.) The same doctrine was recognized and sanctioned by the Supreme Court in the case of *Holmes v. The United Insurance Company*. (2 Johns. Cas. 331.) With respect to the return cargo, the rights

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and interests of the respondents, and *Archer & M' Conehey*, are to be viewed precisely in the same light as if they had sent out cash to *Laguira*, to be invested in a cargo of coffee, to be divided between them on its arrival in *New-York*. If this be the true character of this transaction, as I am persuaded it is, there is no ground, in my opinion, for the claim set up on the part of the appellants. But admitting a partnership to have commenced with *the *shipment* of the outward cargo, and continued throughout the adventure, it would give no legal right to the appellants, to apply the respondents' proportion to the payment of the separate debts of *Archer & M' Conehey*, contracted before the commencement of the partnership.

The law is well settled that if a person takes a partnership security from one of the partners for what is known at the time to be the particular debt of the partner who gives such security, the copartner is not holden. This was the rule laid down by the Supreme Court, in the case of *Livingston v. Roosevelt*, (4 *Johns. Rep.* 271,) and is in conformity to numerous adjudged cases there referred to, both in the equity and common law courts in *England*. The knowledge in the creditor that the partnership name is given for the individual debt of one partner, renders the transaction, in judgment of law, fraudulent and void. And this rule is not confined to *securities* given, but extends to *payments* actually made. Lord *Ellenborough*, in the case of *Swan v. Steele*, (7 *East.* 213,) says, that if a creditor of one of the partners collude with him, to take *payment* or *security* for his individual debt out of the partnership funds, knowing, at the same time, that it is without the consent of the other partner, it is fraudulent and void. So in the case of *Field and another*, in the Court of Exchequer, in *England*, (4 *Ves. jun.* 396,) it was held, that a separate creditor of a partner has no right against the joint property of the partnership, any further than the separate interest of that partner.

To apply those principles to the case before us. The demand of the appellant was against *Archer & M' Conehey* alone. *Kimberly & Brace* were clearly interested in the return cargo, and that fact was known to the appellants. With this knowledge, the funds of the partnership came into their hands; and before the payment of the bills, which constituted the funds, they admit the respondents gave them notice of their interest, and demanded of them their proportion of the proceeds of the return cargo. Under these circumstances, the application of these funds to the payment of the demands of the appellants against *Archer & M' Conehey*, was unauthorized in law. The receipt of the bills was not itself a payment, nor could it in any way affect the appellants' remedy against *Archer & M' Conehey*. These bills not having been paid, nor any release or discharge given to the respondents, it was nothing more than a pledge, as a security for the demand, and which was in no way binding upon *the respondents. One of several partners cannot pledge the partnership fund for his individual

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debt so as to bind his copartners. But the appellants have not even this pretext as a shield, for *M Conehey* says the remittance was made for the benefit of the whole concern, and denies altogether any intention of applying the respondents' proportion to the reimbursement or payment of the appellants, but meant only to deposit the whole with them, until he himself should come and make the necessary arrangements respecting the application of the three fourths belonging to him and *Archer*. The omission to mention any thing in his letters on this subject, affords no inference against him. All the letters respecting the bills were written within the space of twenty days. None of the bills were payable under ninety days after sight, and he probably expected to be in *New-York* before they fell due. Besides, he was writing to persons whom he had previously informed of the interest of the respondents in this adventure, and it would have been superfluous again to repeat it.

It was suggested, though not much pressed on the argument, that the respondents' remedy, if any they had, was complete at law, and, therefore, not proper for a court of chancery. It by no means follows, even admitting the remedy complete at law, that the Court of Chancery has not also jurisdiction. It cannot be denied, at this day, but that there are many subjects upon which courts of law and equity have concurrent jurisdiction. Matters of account form one class of this description of cases, with respect to which the Court of Chancery has a very broad jurisdiction, as the course of proceeding in that court has been considered peculiarly well calculated for the settlement of accounts, if they are in any degree long and complicated. This objection ought not to be very favorably received in this stage of the cause. Pleas to the jurisdiction of a court, being rather objections of form, ought to be interposed at the earliest opportunity. The party ought not to be suffered to wade through a tedious and expensive litigation, and then, in the very last stage of the cause an objection to be made to the jurisdiction of the court, especially where the subject matter of the controversy is within such jurisdiction. This question was discussed and examined very much at large, in this court, in the case of *Ludlow v. Simond*, (2 *Cuines' Cases in Error*, 1,) where it will be found that the principles above suggested are recognised and supported by numerous authorities.

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In whatever light, therefore, the subject is viewed, it appears to me, that even applying to the case the most rigid rules of law, *applicable to partnership transactions, the respondents are entitled to recover one fourth part of the proceeds of the return cargo. This is manifestly consonant to the real justice and equity of the case. That one fourth part both of the outward and return cargo did, in fact, belong to the respondents, is not denied. And it is sufficiently proved that this was within the knowledge of the appellants. No false colors were held out to them to procure the advances made to *Archer & M Conehey*. The advances were made altogether upon the

credit of *Archer & M' Conehey*, whether the appellants knew or did not know of the interest of the respondents in the adventure. If the advances were made, under a promise and expectation of being reimbursed out of the proceeds of the return cargo, and under an ignorance of the respondents' interest, three fourths of the whole proceeds is all they could have looked to for a reimbursement, according to the admissions in their answer. For they say, that the advances were made on the promise of *Archer & M' Conehey*, that the return cargo, being the *avails* of property purchased by *means of their advances*, should be deposited with them. This could only extend to three fourths of the return cargo, for no more was purchased by means of their advances. The other fourth was purchased by means of advances made by *Kimberly & Brace*. Giving the appellants three fourths, will put them precisely in the same situation as if the respondents had had no concern in the adventure, for the outward cargo would then have been one fourth less in value. The appellants, in their answer, do not pretend that their advances and responsibilities, for the cargo of the *Elizabeth*, exceeded 12,000 dollars, and their own witness, *Grinnell*, swears it was about 11,000 dollars. And they admit that they have received upwards of 14,000 dollars. Upon their own showing, therefore, they have been more than reimbursed for their advances. The adventure of the *Hiram*, with which the respondents had no concern whatever, ought to be laid out of view. It would be extremely unjust to throw any part of that loss upon *Kimberly & Brace*. I think, therefore, the equity of the case is clearly with the respondents, and that this equity is supported by the strict and technical rules of law; and, of course, that the decree ought to be affirmed.

SPENCER, J. The first point arising in this case is, whether *Kimberly & Brace*, in judgment of law, were partners with *Archer & M' Conehey*, in the purchase of the outward cargo of the schooner **Elizabeth*. If such limited partnership existed, the decree pronounced in the Court of Chancery cannot be supported. The basis of that decree is, that *Kimberly & Brace* had a distinct and independent interest in one fourth of the outward cargo, and had a right to call on the appellants, into whose hands the proceeds of the return cargo came, to account with, and pay to them, the one fourth part of those proceeds. If this principle was incorrect, and if the respondents were partners in the outward cargo, and jointly liable with *Archer & M' Conehey* to the appellants, for the advances made to them, then, so far from having any equity on their side to call out of the appellants' hands the money received by them, (assuming it at present to be the proceeds of the outward cargo,) they would be liable, as dormant partners, for the credit given by the appellants to *Archer & M' Conehey*.

[His honor here stated the pleadings and evidence in the cause.]

These are the material facts in considering whether the respondents and *Archer & M' Conehey* were partners in the adventure, including the purchase of the cargo.

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It is a principle that will not be denied, that to entitle a party to recover money of another, he must have a superior right to it. It is not enough for a man to show that he has sustained a loss; he must go further, and establish a paramount right to the money he claims. As it regards the appellants, they have equal equity with the respondents. The appellants have advanced their money to *Archer & M'Conehey*, looking to the return cargo of the *Elizabeth*, to be refunded, and, in my opinion, they have a right to keep what they have acquired in the regular course of business, to the full extent of their responsibilities for, and advances to, *Archer & M'Conehey*.

Was the purchase of the outward cargo a partnership concern between the respondents and *Archer & M'Conehey*? I think it was, and that all the authorities support me in this opinion.

A partnership is defined to be a community of interest between two or more, and a sharing of profit and loss. Again, it is defined to be the voluntary association of two or more persons, in sharing the profits and bearing the losses of a general trade, or a specific adventure. *Watson (on Part. 40)* says, "there may be special partnerships, which are formed for a particular concern in a single dealing or adventure. Thus two merchants may join in sending out a cargo of goods to a foreign country; as to this adventure they have all the rights and are subject to all the liabilities of partners, *but the relationship of partners ceases with it, and at no time extends to their other concerns." Again, he says, "if several either build or purchase a ship, they are part owners and partners as to this concern;" that is, they are tenants in common, as respects each other, and partners, as regards third persons, if the ship be employed, in whatever concerns her outfits, or the transactions with other persons relating to her. Again, *Puffendorf (Puff. lib. 5. cap. 8)* defines a partnership, "*Contractus societatis est, quo duo pluresve inter se pecuniam, res aut operas conferunt eo fine, ut quod inde redit lucri inter singulos pro rata dividatur.*"

To constitute a partnership in a particular purchase, or in a single concern, there must either be a joint undertaking to pay, or an agreement to share in the profits and loss.

A case much relied on by the respondents' counsel was *Saville v. Robertson and another*; (4 Term Rep. 720;) and it was supposed to establish the principle, that the partnership between the respondents and *Archer & M'Conehey* did not begin until after the purchase of the outward cargo. That case was shortly this; several persons, unconnected as partners in trade, formed an adventure to the *East Indies*, and it was agreed that they should provide a cargo of goods for the intended voyage, to a specific amount, and each was to bring in his own particular stock, and as to these goods the concerned were to share in profit and loss. One *Pearce* owned the ship, which was valued at £3,750 which he put in, as his part of the adventure. And it was agreed that one should not be bound

for any goods or stores ordered or shipped for the other, and *Pearce* was to be at liberty to ship what goods he pleased over and above the ship and outfit, leaving room for the goods to be shipped by the others. After this agreement, the plaintiff in the suit supplied copper to sheath the ship, and furnished other copper, by *Pearce's* orders, as part of the cargo. It was admitted that the copper for sheathing was a partnership concern, and it was held by the court that the partnership as to the cargo, did not commence till all the parcels of the cargo were delivered on board. Mr. Justice *Ashhurst* held, that the partnership began immediately, and that the several persons who embarked in the adventure were legally liable for the copper sold *Pearce* for the cargo. He says a partnership is a joint undertaking to share in the profit and loss, and that it was a joint concern in the ship as well as the cargo. If this case be law, which I think may be well doubted when other cases are compared with *it, there is yet one striking difference between it and the case before us; here, the outward cargo was purchased in gross, without any designation as to the persons furnishing it; there, each one was to bring in his own particular stock. Again, with respect to the copper furnished for sheathing, though it was laid out on the ship belonging to *Pearce*, yet it was admitted on all hands, that the whole were bound to pay for it, as partners. Now why were they answerable for that copper? Undoubtedly, on the ground that it was furnished for a subject in which they were jointly concerned, and had not the agreement between the parties in that case required each to bring in his own particular stock, they would have been held to have been partners. Had the adventurers in that case employed one person to purchase the whole stock, as in this case, they would, *ipso facto*, have been partners.

The case of *Hoare v. Dawes* (*Doug.* 371) is also relied on to show that there was no partnership in this case. In the purchase of the outward cargo, in that case, several persons employed the same broker to purchase a lot of tea, of which they were to have separate shares, the lots being too large for any one dealer, and the question was, whether all the employers were partners, and answerable for the whole; and it was held that they were not, but that it was an undertaking with the broker by each for a particular quantity. Lord *Mansfield* observes, "there is no undertaking by one to advance money for another, *nor any agreement to share with one another the profits or loss.*"

The next case is that of *Coope and others v. Eyre*. (1 *H. Bl.* 37.) There a number of persons agreed together to buy up oil, and the defendants were to have for their shares, each one fourth of the oil. During the treaty, they declared it was a common concern between them and *Eyre & Co.* in whose names the purchases were made, without any information to the vendor that the defendants had any concern; and whether this constituted those who had so associated together partners, was the question. The court were divided on the point. *Wil-*

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son, Justice, maintained that they were all answerable as partners. The other judges held it not to be a partnership. *Gould*, Justice, said the true criterion was whether they were concerned in profit and loss. *Heath*, Justice, said, "in truth they were not partners, inasmuch as they were only interested in the purchase of the commodity, and not in the subsequent disposition of it." Lord *Loughborough* stated, that "in order to constitute a partnership, a community of profits and loss *is essential; the shares must be joint, though it is not necessary they should be equal; if the parties be jointly concerned in the purchase; they must also be jointly concerned in the future sale."

The cases of *Hoare v. Dawes*, and *Cooper v. Eyre*, are very distinguishable from the present. The adventures never had a community of interest, for the purpose of a joint future sale, or in the profit or loss attending the future sale. In the case before us, there was a perfect community of interest. The cargo was purchased jointly, though to be paid for separately, and it was to be resold by the concern, and the respondents were to share in the profit and loss of the future sale, in proportion to their interest, with *Archer & M'Conehey*. Had the tea, in the one case, and the oil, in the other, been purchased with a view to resell jointly, and to share in the profit and loss, can there be a doubt, from what fell from all the judges, that those cases would have been adjudged partnerships?

But the case of *Holmes v. The United Insurance Company* (2 Johns. Cas. 239) is supposed to be an authority for the respondents. That case was an insurance on the cargo of a ship for the plaintiff's interest, as might appear. The cargo actually shipped belonged to the plaintiff and four others; one eighth of the ship and of the outward and return cargoes belonged to the plaintiff and four others, and these four had no concern in the insurance effected by the plaintiff. The insurance was directed on the plaintiff's account. The plaintiff's actual interest in the cargo on board, including the premium, was 14,200 dollars. The plaintiff had directed a shipment of goods at *Calcutta*, which failed, and the action was brought to recover, as a return premium, the difference between the defendant's subscription, and the interest of the plaintiff, on the ground of a short interest.

The opinion of the court was delivered by the present *Chief Justice*, and it contains a very clear and lucid exposition of the several cases already cited. He stated it as a test of a partnership, that there must be a reciprocal chain and agreement of the parties to unite their stock, and to share in all risks of profit and loss. And he observes, that "it is a strong and decisive fact in the case, that there was no agreement between the parties to share in the future sale of the return cargo;" and stress was laid on the manifest intention of the plaintiff to insure on his own account.

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*I perfectly accord in the decision of that case, for it was ap-

parent that *Holmes* intended only to insure his own interest; that he was over insured, by not getting goods at *Calcutta*, and the court did right to make every possible intendment against a partnership set up for the purpose of pocketing a premium for a risk never contemplated by either party; but the case is too loosely stated, as to the manner of conducting the business between *Holmes* and the other part owners of the cargo, to be cited or relied upon, as establishing a general criterion on the question of partnership, where partnership or not is the very gist of the inquiry.

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The case of *The Assignees of Nixon v. Brush* (2 Caines' Rep. 293) bears on the case before us; *Nixon* and *Brush* agreed to be equally interested in a vessel and cargo, equipping for a foreign voyage. *Nixon* advanced more than his proportion; and on the winding up of the business, a suit was brought for the balance; several objections were raised, all of which were overruled, except one, that an action would not lie at law, on the ground that there existed a partnership between *Nixon* and *Brush*. That objection was considered insurmountable, and we turned the plaintiff round to a court of equity. And, though I differed from the rest of the court in that decision, I admitted that all the owners might be answerable to third persons.

If the joint undertakers in a voyage are not, even as respects themselves, partners, it is utterly inconceivable why the plaintiff should be denied redress in a court of law, for an uncontroverted balance of accounts.

I pay no regard to the opinion of *M' Conehey*, when he says the goods were not sent to *Laguira* as partnership property, in contradiction to the fact to which he also testifies, "that the owners were only interested in the profits and loss thereof, according to each one's proportion of property on board."

Archer & M' Conehey differ in their testimony as to the laying in of the outward cargo. The respondents in their bill, and by that they must be concluded, allege, in express terms, "that the cargo was purchased and laid in, by *Archer & M' Conehey* for themselves and the respondents together, and in gross."

It appears to me, from a review of the cases, that *Watson* is correct in saying "that when two merchants join in sending out a cargo of goods to a foreign country, as to this adventure, they have all the rights, and are subject to all the liabilities, of partners."

*It cannot be admitted, for a moment, that the appellants' ignorance of the fact, that the respondents were concerned in the adventure, when the credit was given to *Archer & M' Conehey*, for the outward cargo, will affect their rights; there is not a case to be met with which does not say that dormant partners, though unknown to the person giving the credit at the time, are equally answerable as though known. And in the case of *Hoare v. Dawes*, Lord *Mansfield* says, "the law respecting dormant partners is not disputed; that they are liable when discovered."

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The result of my opinion, therefore, is, that the respondents

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were liable to the appellants, for the advances made to *Archer & M' Conehey*, for the purchase of the outward cargo, and that, therefore, they have no title to get back what by law they would have been compelled to pay, had it not been paid.

There is another ground, perhaps, more decisive. If we admit that the respondents were not partners, so far as relates to the putting in the outward cargo, they assuredly became so when it was put on board. There was, then, a perfect community of interest, and an agreement to share profits and loss, in proportion to their respective interests; and the case so much relied on, of *Saville v. Robertson and another*, (4 Term Rep. 720,) decides, that the partnership commenced when the cargo was put on board. Assuming this to be so, then *M' Conehey*, as one of the partners, had a complete control over the return cargo; this he disposed of, and remitted from *Norfolk* to the appellants bills to the amount of 12,000 dollars. This act of *M' Conehey* was binding on the respondents, as his partners in that adventure. To hold otherwise would, in fact, be maintaining that the sale of the return cargo by *M' Conehey* was a tortious act, so far as regards the respondents' share, and that they could maintain trover against the purchasers in *Norfolk*. The bills of exchange were remitted to the appellants, clearly for the purpose of paying their debt. This is manifest from *M' Conehey's* letters and from his testimony. The bills were received in the regular course of business, as cash, and the pre-existing debt was the consideration for them.

It is to me a novel and extraordinary idea, that if one partner sells the partnership property, and with the proceeds pays his own debt, that his copartners shall pursue this payment, and recover it back from the persons who had a right to receive it. The same remarks are applicable to the coffee sent on to the appellants from *Norfolk*. If a man should tortiously take my property and sell it, and with the money pay his creditor, it might as well be contended, that I could recover the money, thus paid, as that the respondents can recover the money which has, in the regular course of mercantile business, come into the hands of the appellants. On this ground, therefore, I am satisfied that the decree is wrong.

With respect to the notice given of the respondents' interest in the cargo, it is apparent from the bill, that it is not alleged as a ground of relief that the appellants had notice of the respondents' interest, until after they had acquired a right in the bills and in the coffee; and whatever the appellants may have insisted on in their answer upon the subject of notice, it was not a point in issue between the parties, for the respondents' benefit. If the appellants could have proved that no notice was given, their answer would have allowed them to have done so by way of defence. If they have failed in proving this, the respondents cannot claim that they have proved notice, as a ground of equity on their side, because they have not made it a substantive ground in their bill; and the case of *James v. M' Kernon* warrants this doctrine. We are, then, bound to

consider the appellants as having received actual payment, in bills and coffee, of their debt, without notice that the respondents had any concern in the return cargo, and this takes away all equity on the part of the respondents.

The only remaining point is, as to the jurisdiction of the Court of Chancery; and I must confess that I perceive no color for it. The respondents claim on the ground that the appellants have received money to their use. Had a discovery been necessary, the bill might have been entertained for that purpose, but the bill is for relief also. If the well known boundary between courts of equity and law has been broken in upon by the present bill, as it seems to me it has, the bill ought for that reason, to have been dismissed. If the court below ought to have dismissed it, this court should do it. Though not a stickler for forms, yet I am for keeping courts within their jurisdiction; and am very much opposed to transferring questions of purely a legal nature to a court of equity.

I cannot subscribe to the doctrine, that because courts of equity have a concurrent jurisdiction, in matters of account, with courts of law, that a jurisdiction shall be assumed, under the notion of settling accounts, when the only matter of account is to ascertain how much a quantity of coffee sold for.

I trust that I have advanced nothing alarming in this opinion, and *that I shall not be suspected of contending, that if several persons ship wheat to market, having no community of interest, nor not being to share in common the profits and loss attending its sale, that the mere circumstance of the carrier's intermingling it will create a partnership. But I do insist, that in the various points of view in which I have been able to consider this case, the decree is erroneous, and that, therefore, it ought to be reversed, with directions that the bill be dismissed.

KENT, Ch. J. It is a fact in the case, that *Kimberly & Brace* were owners of one fourth part of the cargo on board of the *Elizabeth*, and that it was purchased with their money. It is a further fact, that the proceeds of this one fourth part, as well as of the residue of the cargo, came to the possession of *Post & Russell*, and was appropriated to pay debts due to them from *Archer & M' Conehey*. The very statement of these facts shows that the apparent equity of the case is with *Kimberly & Brace*; for their property ought not to be taken from them to pay the debts of third persons, without their consent. Every man of plain, good sense, will at once see the justice of this conclusion, and he will immediately adopt it, unless restrained by some principle of law, or some technical rule of commercial policy applicable to the case, by which *Archer & M' Conehey* were enabled to bind and legally transfer the property of *Kimberly & Brace*.

I have examined the case with a view to such a rule, and I find none that applies.

1. Here was not, according to my view of the case, a partnership between *Kimberly & Brace* and *Archer & M' Cone-*

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hey, so as to render the disposition of the return cargo by *M' Conehey* binding, as the act of a partner, on *Kimberly & Brace*. This was considered by the counsel for the appellants as the most prominent point in the cause, and, therefore, it deserves the more attention. No person ought to be involved in the responsibilities of a copartnership, unless it be by his own consent and agreement, or unless his conduct be such as to deceive the world, and induce others to act under the belief that he is a partner. In this case, there was not only no partnership in fact, but none in appearance. If we examine the transaction from the beginning to the end of it, there will not be found the requisite evidence of a partnership association. There was no agreement that the first purchase should be made upon a joint credit, nor was there any agreement to be jointly *concerned in the final result of the adventure. *Kimberly & Brace* advanced their own money for the purchase of their one fourth of the outward cargo, and *Archer & M' Conehey* acted only as the common agents, in making the purchase. There was clearly no partnership in the purchase of the outfit, and it was so far like the case of *Saville v. Robertson and another*. (4 Term Rep. 720.) There was no more of a partnership act in this purchase, than there was in the case of *Hoare v. Dawes*, (Doug. 371,) where a broker was employed by a number of persons to purchase a lot of tea, of which each was to have his separate share, and it was held that they were not partners in the tea, because there was no undertaking by one to advance money for another, nor any agreement to share with one another in the profit or loss.

Nor do I think that a partnership existed after the cargo was shipped for *Laguira*, so as to affect this case, because there was no agreement to share jointly in the *ultimate* profit and loss of the voyage. The appellants were bound to show, affirmatively, such an agreement, and we are not to infer it, merely because the contrary is not expressly shown. The parties had no previous partnership or previous connection with each other in trade, and we are to make no intendment in favor of the partnership, so as to supply the absence of facts. The supercargo was authorized to sell the outward cargo, and with the proceeds of it to buy a return cargo, and so far the loss and profit of that outward cargo might be joint and mutual; and I am willing to admit, for the sake of argument in this case, that there was a partnership responsibility so far as respected the charge of transporting and selling the outward cargo; but there the partnership terminated, and we have no proof, nor ought we to presume any, that the return cargo was purchased for joint profit and loss, and that they were to share jointly in its disposition. The parties were distinct commercial houses, and each house would undoubtedly have been entitled to its distinct, *aliquot* share or proportion of the return cargo, on its arrival at *New-York*, and to have disposed of it, as each party thought proper, on his own account and risk. *Kimberly & Brace* would have taken to themselves the one fourth of the

return cargo. Thus in the case of *Coope and others v. Eyre and others*, (1 H. Bl. 37,) several persons entered into an agreement to purchase a quantity of oil in the name of A. only, and each was to receive his distinct share, and it was held not to create a partnership. Because the sale was to be joint at *Laguira*, (and that is the only thing that looks like a *partnership in the whole case,) it does not follow that the subsequent sale was to be joint. As the separate shares in the outfit were held by them as tenants in common, the sale of that cargo was necessarily joint; and so it is, if several persons send their wheat together in one sloop to market, with directions to the captain to sell it for the benefit of each, but their respective proportions of interest in the proceeds have never been considered as liable for each other's debts.

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We must be careful not to carry the doctrine of constructive partnership so far as to render it a trap to the unwary. We must in this, as in other cases, look to the *entire* transaction, in order to judge correctly of its nature and tendency. If there be no previous general partnership, nor any purchase for a particular adventure, on a joint credit, nor any agreement to share jointly in the ultimate profit and loss of that adventure, nor any act imposing themselves upon the world, as partners, I humbly presume that there is no law or justice that would hold them liable as partners, beyond the particular expenses of the carriage and sale of the outward cargo. To make the property of one party in the return cargo, answerable for the separate debts of the other party, appears to me to be both unreasonable and illegal. The profit and loss of the voyage was never to be joint and mutual. The eventual gain or loss of one party might be very different from that of the other, because each house was to act for itself in the disposition of its proportion of the return cargo. There is nothing in the case to contradict this conclusion, and this fact is with me decisive against the pretension of a copartnership. The interest of each party was never blended into one common stock of profit and loss, but preserved its distinct character, subject to its own profit and loss at the conclusion of the adventure. *Doris amara suam non intermisceat undam.*

2. If the act of *M' Conehey* was not binding on *Kimberly & Brace*, as the act of a partner, I know of no circumstances in the case to prevent *Kimberly & Brace* from compelling *Post & Russell* to account for one fourth of the proceeds of the return cargo. One fourth came to their possession, and they insist upon a right to appropriate it, under the direction of *M' Conehey*, to pay his debts and those of the firm of *Archer & M' Conehey*, but *M' Conehey* had no authority to pledge this property of *Kimberly & Brace*; and *Post & Russell* had no right to apply it to their own use, if they were informed to whom it belonged. Their debt *was originally created on the credit of *Archer & M' Conehey*, and not of *Kimberly & Brace*. The bills of exchange were not taken, in the course of business, as cash. There was no consideration given for the bills when

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they were received. They were deposited with *Post & Russell*, by *M' Conehey*, to be collected and appropriated to the payment of their prior demands against *M' Conehey* and his partner. The receipt of the bills was not, of itself, a payment, and the notice which they admit to have received before the bills fell due and were paid, was sufficient to put them upon inquiry. If they afterwards passed the amount of the bills and the proceeds of the coffee to the credit of *Archer & M' Conehey*, they did it at their peril. It is, therefore, in this view, an immaterial fact, whether *Post & Russell* had notice, at the commencement of the voyage, of the interest of the respondents; though I am of opinion that the weight of evidence is decidedly in favor of the allegation that they had such notice. And if that be the fact, (which, I think, is the weight of the evidence, and the point was sufficiently in issue,) then it becomes perfectly immaterial whether there was or was not a partnership. If there was one, yet the engagement of *M' Conehey* to bind the property of his copartners, without their consent, for his own private debts, was fraudulent as to him, and void (to say no more) as to *Post & Russell*, who took the engagement under such knowledge. But it is sufficient for this case, that they had notice while the bills remained in their hands to collect, and before they were due or paid. The subsequent receipt of the money by them on the bills, and on the coffee, formed the ordinary case of money received to another's use, and for which they ought to account.

Supposing they were liable to the respondents, it has not been made a question, either in the court below, or upon the argument here, whether chancery had not jurisdiction of the cause. Nor could there have been any doubt upon this point, if the question had been raised, for the Court of Chancery has a concurrent jurisdiction with the courts of law, in all matters of account, and so it was understood and decided by this court, in 1805, in the case of *Ludlow v. Simond*. (2 *Caines' Cases in Error*, 1.)

With respect to the coffee, there is some obscurity hanging over the case, and it is impossible to know exactly the truth. I am satisfied, however, with the relation of the master of the *Elizabeth*, who says, that the coffee was the proceeds of the outward cargo, and that the bill of lading which *M' Conehey* signed and gave to **Grinnell* was given with reluctance; and he says he always believed the bill of lading was given for property then on board the *Elizabeth*, belonging to the owners of the cargo shipped from *New-York*. *M' Conehey* also says, that no part of the cargo purchased at *Laguira*, was purchased or shipped for *Grinnell*. As this was a voyage to the *Spanish* colonies, and probably a smuggling trade, it may account for some mystery and double dealing in the transactions at *Laguira*. I am well convinced that *Kimberly & Brace* are as much entitled to their proportion of this coffee as of the residue of the return cargo. The law and the equity of the

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case are equally with the respondents, and the decree ought to be affirmed.

LEWIS, Senator, was of opinion that the decree of the Court of Chancery ought to be *reversed*, and gave his reasons.

TAYLER, Senator, was of opinion that the decree of the court below ought to be *affirmed*, and gave his reasons.

A majority of the court (*for affirming*, 14; *for reversing*, 12) being of opinion that the decree of the court below ought to be *affirmed*, it was, thereupon,

ORDERED, ADJUDGED and DECREED, that the decree of the Court of Chancery be affirmed, and that the petition of appeal be dismissed; and it was further *ordered* and *adjudged*, that the respondents recover interest on the sum reported by the master to be due to them from the appellants, from the time the said report was confirmed; and also that the respondents recover one hundred and fifty dollars, for their costs, &c. and that the record be remitted, &c.

Judgment of affirmance.

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March 10th,
1812.

*ROBERT R. LIVINGSTON AND ROBERT FULTON,
Appellants,
against

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JAMES VAN INGEN, H. BOYD AND TWENTY OTHERS,
Respondents.

THE appellants filed their bill against the respondents, in the Court of Chancery, on the 14th of *September*, 1811. The bill stated:

That on the 19th of *March*, 1787, the legislature of the state of *New-York* passed an act, entitled "An act for granting and securing to *John Fitch* the sole right and advantage of making and employing for a limited time, the steam-boat by him lately invented;" which act recited: That whereas *John Fitch*, of *Bucks* county, in the state of *Pennsylvania*, had represented to the legislature of this state, *that he had constructed an easy and expeditious method of impelling boats through the water, by the force of steam*; and praying that an act might be passed, granting to him, his executors, administrators and assigns, the sole and exclusive right of making, employing and navigating, all boats impelled by the force of steam or fire: Wherefore, in order to promote and encourage so useful an improvement, it was, by the same act, enacted, that the said *John Fitch*, his heirs, administrators and assigns, should be, and they were thereby vested *with the sole and exclusive right and privilege of constructing, making, using, employing and navigating, all and every species or kinds of boats, or water craft, which might be urged or impelled through the water, by the force of fire or steam, in all creeks, rivers, bays and waters whatsoever, within the territory and jurisdiction of this state, for and during the full end and term of fourteen*

The several acts of the legislature of the 27th *March*, 1798, (*sess.* 21, c. 55,) of the 5th *April*, 1803, (*sess.* 26, c. 94,) of the 6th *April*, 1807, (*sess.* 30, c. 165,) of the 11th *April*, 1808, (*sess.* 31, c. 225,) and of the 9th *April*, 1811, (*sess.* 34, c. 200,) granting and securing the sole and exclusive right of using and navigating boats by steam, &c. in the waters of this state, to certain persons therein named, for a certain term of years, are constitutional and valid; and the party in possession of the right, under those statutes

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is entitled to
an injunction,
to restrain oth-
ers from in-
fringing that

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right; although
the statute de-
clared that the
boats, &c. us-
ed in violation
of the right of
the grantees
should be for-
feited to them;
and an action
of detinue was
brought by vir-
tue of the act,
to recover the
boats, &c. so
forfeited to the
grantees. (a)

years from and after the then present session of the legisla-
ture; that if any person or persons whomsoever, without being
properly authorized by him the said *John Fitch*, his heirs, ex-
ecutors or administrators, should make, use, employ or navi-
gate, any boat or water craft, which should or might be urged,
impelled, forced or driven through the water, by the force,
power or agency, of fire or steam, as aforesaid, within the ter-
ritory or jurisdiction of this state, every person so offending
against the tenor, true intent and meaning of the said act, for
each and every such offence *should forfeit* and pay unto the
said *John Fitch*, his heirs, *executors or administrators, or to
such other person or persons, as he, his heirs or assigns, should
authorize and empower, for that purpose, *the sum of one hun-
dred pounds, to be recovered by action of debt, in any court
of record within the state wherein the same might be cogni-
sable, with costs of suit*; and should also *forfeit to him*, the
said *John Fitch*, his heirs or assigns, *all such boats or water
craft, together with the steam engine, and all the appurtenan-
ces thereof, to be recovered in manner aforesaid, with costs
of suit*. That neither the said act, nor any clause, matter or
thing therein contained, should be taken, deemed or construed,
to prohibit or prevent any person or persons from making,
using, employing or navigating within this state, any kind of
boat or water craft, theretofore invented, or thereafter to be
invented, on any other principles, construction or mode, which
might be urged, impelled, or driven along through the water
by any other power, force, agency or means, except fire or
steam:

That *Robert R. Livingston* having bestowed much time
and attention on the subject of applying the force of fire and
steam to the purposes of navigation; and, after a variety of
experiments, made at a very great expense, ascertained, as he
conceived, a mode of applying the steam engine to propel a
boat on new and advantageous principles; but being unwilling
to run the risk and hazard of making a practical experiment
of his plans, which could not be done but at a very great ex-
pense, unless he was encouraged to do so, by having an exclu-
sive right and privilege secured to him by law, in case his plan
should be found to answer his expectations, represented to the
legislature his willingness and desire to incur the expense of
an experiment which might prove so useful and beneficial to
the community, if the legislature would guaranty to him such
an exclusive privilege as, in the event of such success in his
experiments, should be some remuneration for his hazard and
expense, and some compensation as an equivalent for the
benefit that would result to the public from his efforts on that
subject:

That notwithstanding the above-mentioned law passed in
favor of *John Fitch*, he never, to the knowledge or belief of
the appellants, made any attempt to employ or navigate, on
any of the waters of this state, any kind of boat or craft, urged
or impelled through the water by the force of fire or steam, or

(a) Vide *Livingston v. Ogden*, 4 Johns. Ch. Rep. 48. *Livingston v. Tompkins*, Id. 415. *Ogden v. Gibbons*, Id. 150, 174. *North River Steam Boat Co. v. Livingston*, 3 Cowen, 713. *North River Steam Boat Co. v. Hoffman*, 5 Johns. Ch. R. p. 200. *Gibbons v. Ogden*, 9 Wheat. 1.

in any manner to avail himself of the privilege granted to him by the law :

That in consequence of the above-mentioned representation *made to the legislature of this state, and of the failure of *John Fitch* to employ or navigate on any of the waters of this state, any kind of boat, urged or impelled through the water by the force of fire or steam, or in any manner to avail himself of the privilege granted to him, as aforesaid : and the proposed experiment of *Robert R. Livingston* appearing to the legislature of this state to be laudable, and deserving of encouragement, a law was passed by the legislature, on the 27th of *March*, 1798, entitled “ An act repealing an act, entitled ‘ An act for granting and securing to *John Fitch* the sole right and advantage of making and employing the steam-boat by him lately invented, and for other purposes ;’ ” which act recited, “ that whereas it had been suggested to the people of this state, represented in senate and assembly, that *Robert R. Livingston* was the possessor of a mode of applying the steam engine, to propel a boat on new and advantageous principles ; but that he was deterred from carrying the same into effect, by the existence of the law first above-mentioned, as well as by the uncertainty and hazard of a very expensive experiment, unless he could be assured of the exclusive advantage of the same, if on trial it should be found to succeed ; ” and further reciting, “ that whereas, it was further suggested, that *John Fitch* was either dead or had withdrawn himself from this state, without having made any attempt, in the space of more than ten years, of executing the plan for which he so obtained the exclusive privilege, whereby the same was justly forfeited ; ” it was, therefore, enacted, that the act first above-mentioned should be, and was thereby, repealed ; and to the end that *Robert R. Livingston* might be induced to proceed in an experiment which, if successful, promised important advantages to the state, it was, in and by the same act, further enacted, that privileges similar to those granted to *John Fitch*, in and by the act before first mentioned, should be, and were, thereby extended to *Robert R. Livingston*, for the term of *twenty years* from the passing of the act of the 27th of *March*, 1798 : Provided, nevertheless, that *Robert R. Livingston* should, within twelve months from the passing of the act, give such proof as should satisfy the governor, the lieutenant-governor and the surveyor-general of this state, or a majority of them, of his having built a boat of at least twenty tons’ capacity, which should be propelled by steam, and the mean of whose progress through the water, with and against the ordinary current of the *Hudson’s* river, taken together, should not be less than four *miles an hour, and should, at no time, omit, for the space of one year, to have a boat of such construction, plying between the cities of *New-York* and *Albany* :

That from the time of the passing of the last-mentioned act, until the month of *April*, 1803, *Robert R. Livingston* was engaged in efforts to accomplish the object specified in the

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last-mentioned act, and for that purpose had made divers experiments, at a very great expense, which, though they proved ineffectual, convinced him of the practicability of his scheme: and that *Robert Fulton* having also, for a length of time, turned his attention to the same subject, and made many efforts and experiments to accomplish the same object; and having discovered certain principles and improvements for the application of the steam engine to the purpose of navigation; and the appellants having agreed to combine their efforts to apply the power of steam to propelling boats, and their interests in what might be the result of their endeavors; the appellants, about the time last-mentioned, caused to be made an application to the legislature of this state, in consequence of which, the legislature, on the 5th of *April*, 1803, passed a law, entitled "An act relative to a steam-boat." By which it was enacted, that the rights, privileges and advantages granted to *Robert R. Livingston*, in and by an act, entitled "An act repealing an act for granting and securing to *John Fitch* the sole right and advantage of making and employing the steam-boat, by him lately invented, and for other purposes," passed the 27th of *March*, 1798, should be extended to *Robert R. Livingston*, and *Robert Fulton*, for the term of twenty years from the passing of the act of the 5th of *April*, 1803; that the term for giving the necessary proof of the practicability of a boat of twenty tons' capacity, being propelled by steam through the water, with and against the ordinary current of *Hudson's* river, taken together, four miles an hour, should be, and the same was, thereby extended to two years from the passing of that act."

That by a law, passed on the 6th of *April*, 1807, entitled "An act to revive an act, entitled 'An act relative to a steam-boat,' it was, enacted, that the act, entitled 'An act relative to a steam-boat,' " passed the 5th of *April*, 1803, should be, and the same was thereby extended for the term of two years, from the 6th of *April*, 1807, to exhibit the proofs required by the act, passed on the 5th of *April*, 1803:

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That within two years from the passing of the last-mentioned *act, and previously to the month of *April*, 1808, the appellants, by their joint efforts, and at their joint expense, built a boat of more than twenty tons' capacity, which was propelled by steam through the water, with and against the ordinary current of *Hudson's* river, taken together, more than four miles an hour; which boat had ever since been constantly plying (except when the navigation of the river was interrupted by ice) between the cities of *New-York* and *Albany*, and that the appellants did give such proofs as satisfied the governor, the lieutenant-governor and the surveyor-general of this state, or a majority of them, that the appellants had built a boat of at least twenty tons' capacity, which was propelled by steam, and the mean of whose progress through the water, with and against the current of *Hudson's* river, taken together, was not less than four miles an hour, as by the before-mentioned laws was

required: as by a certificate, under the hands of *Daniel D. Tompkins*, Governor, *John Broome*, Lieutenant-Governor, and *Simeon De Witt*, Surveyor-General, bearing date the 28th of *July*, 1808, in the possession of the appellants, might appear:

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That the appellants having established their boat, as aforesaid, by a law, passed on the 11th of *April*, 1808, entitled "An act for the further encouragement of steam-boats in the waters of this state, and for other purposes," it was, among other things, enacted, that whenever *Robert R. Livingston* and *Robert Fulton*, and such persons as they may associate with them, should establish one or more steam-boats or vessels, other than that then already established, they should, for each and every such additional boat, be entitled to five years' prolongation of their grant or contract with this state: Provided, nevertheless, that the whole term of their exclusive privileges should not exceed thirty years after the passing of that act; that no person or persons, without the license of the persons entitled to the exclusive right to navigate the waters of this state by boats moved by steam or fire, or those holding a major part of the interest of such privilege, should set in motion, or navigate, upon the waters of this state, or within the jurisdiction thereof, any boat or vessel moved by steam or fire; and the person or persons so navigating with boats or vessels moved by steam or fire, in contravention of the exclusive right of the appellants, and their associates and legal representatives, *should forfeit such boat or boats and vessels, together with the engines, *tackle and apparel thereof, to the appellants and their associates:*

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That the appellants, having, in all respects, complied with, and fulfilled, the terms and conditions expressed in the before-mentioned laws, *became entitled to the exclusive right and privilege to navigate the waters of this state by boats moved by steam or fire:*

That the appellants have ever since held, and yet hold, and were entitled to all such exclusive right or privilege, having never parted with or assigned any part of the same, nor had they any associates in that business; and well hoped that they would be left in the uninterrupted enjoyment of their exclusive right and privilege, the more especially, as the same was considered by the legislature of this state, as well as by the appellants, as a contract with the people of this state, the benefit of which they were to enjoy, as a consideration for their exertions in establishing so useful an improvement in the art of navigation, for the hazard they had run in making their experiments, and for the great sums of money which they expended in carrying their plans into successful operation:

That the respondents, in contravention of the grant, or contract, made to and with the appellants, and the exclusive right or privilege to navigate the waters of this state with boats moved by steam or fire, vested in the appellants, without any license

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from the appellants, had set in motion in the waters of this state, and within the jurisdiction thereof, that is to say, on the waters of the *Hudson's* river, a certain boat or vessel, moved by steam or fire, called the *Hope*, which boat had, for a long time past, been employed, and as the appellants believed, and as the respondents publicly avowed, was intended to be employed, in navigating and carrying passengers on *Hudson's* river, between the cities of *New-York* and *Albany*; whereby such boat or vessel, together with the engine, tackle and apparel thereof, had become forfeited to, and were then justly and rightfully the property of, the appellants :

That the appellants had demanded the boat of the respondents, and required them to give her up to them, as being forfeited to and belonging to them ; but that the respondents had refused so to do, insisting upon holding the same, and on their right to navigate the waters of this state therewith :

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That the respondents actually retained the possession of *the boat, and were employing her, against the will of the appellants, in carrying passengers for hire between the cities of *New-York* and *Albany*, and receiving, and appropriating to their own use, the emoluments, arising from such unlawful use of such boat ; pretending that no such laws as are above-mentioned or recited have been passed ; or, if they had been passed, that the appellants had not complied with the terms and conditions thereof.

The bill prayed that the respondents might be enjoined from using or employing the boat called the *Hope* in navigating the waters of this state, without the permission, and in contravention of the rights of the appellants ; that the appellants might have such other and further relief as the nature of their case should require ; and that process of *subpœna* should issue against the respondent.

On presenting the bill to the chancellor, he refused to grant the injunction, on the *ex parte* application of the appellants ; but directed, on filing the bill, an order to be entered that the respondents show cause by the first day of the next term, why an injunction should not issue, according to the prayer of the appellants.

In consequence of this order, the respondents appeared in the Court of Chancery, at the *October* term, 1811, and, amongst other grounds, upon which an injunction was resisted, read in evidence an act of the legislature of this state, passed the 9th of *April*, 1811, entitled “ An act for the more effectual enforcement of the provisions contained in an act, entitled ‘ An act for the further encouragement of steam-boats on the waters of this state, and for other purposes ; ’ ” whereby it is enacted, that the several forfeitures mentioned in the act, entitled “ An act for the further encouragement of steam-boats on the waters of this state and for other purposes,” passed the 11th *April*, 1808, shall be deemed to accrue on the day on which any boat or boats moved by steam or fire, not navigating under the license of *Robert R. Livingston* and *Robert Ful-*

ton, their associates or assigns, shall navigate any of the waters of this state, or those within its jurisdiction, in contravention of the act; and that *Robert R. Livingston* and *Robert Fulton*, their associates and assigns, shall and may be entitled to the same remedy, both in law and equity, for the recovery of the boat or engine, tackle and apparel, as if the same had been tortiously and wrongfully taken out of their possession: That when any writ, suit or action is brought for the recovery of such forfeitures, the defendant or defendants to such writ, suit or action, the captain, *mariners and others employed in so navigating, in contravention of the law, shall be prohibited, by writ of injunction, from navigating with or employing such boat or boats, engine or engines, or from removing the same, or any part thereof, out of the jurisdiction of the court, or to any other place than that which shall be directed for their safe keeping by the court, during the pendency of such suits, action or actions, or after judgment shall be obtained, if such judgment shall be against the defendants, or the master, or thing forfeited: That when the plaintiffs shall elect to sue out an injunction, the court granting the same shall impose upon them such rules as may appear just and proper, to prevent unnecessary delays in bringing such suit to issue and trial: *Provided always, that nothing in that act should be deemed or construed to extend or apply to the two boats or vessels, commonly called steam-boats, belonging to Hamilton Boyd, Isaiah Townsend, Robert R. Henry, and their associates, or to the captain, mariners and others employed in navigating the same, which boats or vessels were lately launched at the city of Albany, nor to the steam-boat which, during the last summer, plied on lake Champlain, said to belong to James Winants and his associates, or to the captain, mariners, or others employed in navigating the same, but in regard to those three boats or vessels, Robert R. Livingston and Robert Fulton, and their associates or assigns, should have and enjoy all the remedies heretofore provided, in and by, or resulting from, any former law or laws of this state, and the relative rights and remedies of the respective parties, in relation to the three boats or vessels above-mentioned, should be and remain as if that act had not been passed.*

It was admitted, by the appellants' counsel, that an action of *detinue* had been commenced, and was pending in the Supreme Court of this state, before the filing of the appellants' bill, for the recovery of the *Hope*, her tackle, apparel and furniture.

The parties having been heard by their counsel, his honor the chancellor, on the 18th *November*, 1811, discharged the rule to show cause, and denied the appellants' motion for an injunction; and from the order for this purpose the present appeal was made to this court.

The reasons for this decree were thus assigned by

THE CHANCELLOR. An application was made by the complainants in this cause, upon filing the bill, for an injunction to

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restrain *the defendants from using a *steam-boat*, called the *Hope*, in the navigation of *Hudson's* river; on which an order was made, requiring the defendants to show cause why such an injunction should not be granted.

There are circumstances in this case which would have induced me to have availed myself of the aid of one of the judges of the Supreme Court, to decide on the important and novel questions which were presented, if the forms of the court, and the established modes of proceeding, had admitted of it; but that resort being beyond my reach, the duty imposed prescribed my line of conduct.

The parties were heard on the subject of this order; and, on the part of the defendants, it was objected that the complainants' claim to an exclusive navigation of steam-boats was,

1. Contrary to the constitution of the *United States*;
2. That the statute under which the complainants claim having prescribed a remedy for violations of the exclusive right, chancery must leave them to pursue it, without its interference.

The complainants applied for an injunction, on the ground of a clear exclusive right, granted to them by an act of the legislature of this state, secured and extended by several successive acts.

Prior to the adoption of the constitution of the *United States*, the respective states possessed an absolute sovereignty; but the exercise of some of their powers of sovereignty was devolved upon congress, by the legislature of the particular states. The residuum remained unimpaired with the several states. The congress was undeniably a representation of federative states, and represented their sovereignty collectively, in their foreign relations and the domestic objects appropriately within those powers.

None of the restrictions imposed by the confederation could have been applied to the present case, but the fourth article, which in less comprehensive general terms, but more in detail than the new constitution, secured to the citizens of the *United States* common privileges and immunities.

The constitution, in the eighth section of the first article, confers on congress the power "to regulate commerce with foreign nations, and among the several states. To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

The second section of the fourth article declares, "that the citizens *of each state shall be entitled to all the privileges and immunities of citizens of the several states."

The grant in question is not of the exclusive right of a propelling power applied to machinery of an ascertained construction; but is a grant of the propelling power at large, wherever it is possible to create it on the waters of the state, if applied to the purpose of navigating vessels.

There is, certainly, a manifest difference between a grant

from the executive, a department of the government moving in its destined orbit, and one made by the legislature vested with the supreme power of regulating and disposing of the common property of the state, according to what it may conceive conducive to the general welfare and prosperity of the community.

How far the power of the legislature may be rightfully exercised, and that it has a right I hold unquestioned, as to appropriating, regulating and improving the navigable waters of the state, of every description, for public beneficial purposes, as for accommodation of commerce or navigation, was not a point in the range of my inquiry.

That the elements of air and flowing water, are incapable of any other than a usufructuary property, is an elementary truth. (2 *Bl. Com.* 14.) They can only be used during the time they are arrested and occupied, and the actual possession retained by such use. If they escape from the grasp of the occupant, or he abandons them, they return to the common stock, and every other man who can have access to them, has a right to enjoy them afterwards; for "water and air," says *Blackstone*, (2 *Bl. Com.* 18. *Brownl.* 142,) "are moving things, and must of necessity continue in common, by the law of nature." Hence, by the *English* law, as well as the law of this state, an action cannot be maintained for a pond or rivulet, so many acres or cubic yards of water; but for the land at bottom, as so many acres of land covered with water; and by a grant of water nothing passes but a right of fishing. (*Co. Litt.* 4.)

Air is so much less susceptible of substantial, permanent ownership, that it is not even capable of being occupied for the ordinary purposes of life, other than by respiration or for ventilation, which require a free unrestrained circulation to adapt them to either. If confined within impervious limits, those must necessarily have been formed of matter capable of appropriation; but in that case, the materials of the enclosure constitute the line of property, without any relation to its evanescent contents.

Steam, as an elastic fluid composed of air and water, rarified *and expanded by the force of heat, partakes of both those elements, and has the volatile, elusive properties of both, in a higher degree. It requires an impenetrable substance to resist its escape, so as to separate it from the common air of the atmosphere. It is water expanded in greater space and in a subtler state of fluidity, than in its natural state, and, from its properties, less adapted to permanent appropriation than either of its constituent parts. Hence, it is to be inferred, that steam could not have been the subject of the grant, as property.

The vessel propelled could not be the subject of grant. Its dimensions and form must be adventitious. The complainants were to construct it, at their own expense, and the propelling power is a quality extrinsic and accidental.

If neither steam nor the vessel using it, could attach a right

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of this kind, its basis must be laid in the navigable waters of the state, and it became necessary to examine on what foundation it can rest there.

When *Justinian*, the Emperor of the *East*, devised his code of civil law, he acknowledged the source of the right to the common enjoyment of air and water to be paramount to his authority, and bestowed, as a common boon, by the hand of nature, or, as we would express the same sentiment, *by Nature's God*; an acknowledgment, from the situation of the legislator, from the occasion and manner of making it, calculated to impress the mind with its sincerity and truth, and that it was dictated by the general sense of mankind.

The civil code was, in its origin, merely municipal; but from the extent of country and population for which it was devised, from the great antiquity of its sources, from the amelioration which the experience, wisdom, and science of successive ages had infused, from the sound maxims of justice and jurisprudence it contained, from the able and learned jurists intrusted with its compilation, as well as its intrinsic worth, it has been deservedly held in reverence by all the civilized world, and in many *European* countries, is the avowed basis of their municipal laws; but, perhaps, in no one instance, is it entitled to more profound respect than for such formal disclaimer, and its motives, which the acknowledgment imports.

In the *Institutes* (*Lib. 3. tit. 1. de aere, aqua profluente, &c.*) it is laid down, that those things which are given to mankind, in common, by the law of nature, are the air, running water, the sea, &c.

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*All rivers (*Just. Inst. lib. 2. tit. 2. De Fluminibus et Portibus*) and ports are public, and, therefore, the right of fishing in ports or rivers is in common; and herewith agrees *Domat*. (29. 398.)

The general principles applied to the sea, have as uniformly been extended to rivers in which the tide ebbs and flows, *as arms of the sea*. Those rivers flowing through territories which bind and confine them, contract their public use to the people of the states bordering on them; which, in practice, has been considered as a national occupancy, vesting in the people of those states the same enjoyment, as common to all, on a more contracted scale; but whether, when flowing through distinct sovereignties, they are at all susceptible of exclusive national appropriation, so as to exclude the nation most remote from the sea from a free access to it, has been a question of animated discussion both here and in *Europe*.

The common law doctrine is conformable to those principles; and is conceived in such terms, and to be traced to so early a day, as to warrant a presumption that it is derived from the civil law.

Bracton (*Bract. lib. 1. c. 12. s. 6*) is quoted by Sir *Matthew Hale*, in his *Treatise de Jure Maris, &c.* contained in *Hargrave's Law Tracts*, (23,) as to the common use of rivers and ports.

That navigable rivers in which the tide ebbs and flows, are considered as arms of the sea, and, as it would seem, whether the waters were salt or fresh, was recognised in a number of cases; (*Davies' Rep.* 149. 1 *Mod.* 105. 6 *Mod.* 73. 1 *Salk.* 357. 4 *Burr.* 2164;) and some traces of the jealousy with which they were guarded from obstruction are to be found as early as *magna charta*. (*Mag. Char.* c. 23.)

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The passage from *Hargrave* (*Harg. Law Tracts*, 110) was not quoted correctly by the counsel for the complainants, for he there speaks of *inland* rivers, which empty themselves *mediately* into the sea, to which different doctrines apply. In the case from 6 *Mod.* 73, *Holt* held that the king's grant could not bar a common right of fishing in a navigable river. But *Hale*, in his treatise, shows a number of cases in which a grant of that kind was held available, and that a subject might possess a franchise in a port; as customs arising from its use, or even the soil; and so is now the acknowledged doctrine; but though all these rights might exist in subjects, the *jus publicum* of passage and repassage was not thereby destroyed, and no annoyance or obstacle was to be tolerated to interrupt or incommode the navigation.

Hale (*Harg. Law Tracts*, 84) remarks, that when a port is fixed, though the soil, franchise or dominion thereof, *prima facie*, is in the king, or by derivation* from him, in a subject, yet that the *jus privatum* is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners, in peace with the kingdom, are interested, by reason of commerce, trade and intercourse; "and this public right consists, among other things, principally in that they ought to be free and open for subjects and foreigners, to come and go with their merchandise;" that "they ought to be preserved from impediments and nuisances that may hinder or annoy the access, abode or recess of ships," &c.

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Navigable rivers, in which the tide ebbs and flows, are within the same reason, and subject to the same distinctions. They admit of private interests in them; but they must all be subservient to the public interest, to promote and protect which, in *England*, the king has a general conservancy; but whenever he makes a grant of the soil or franchise of a port, or of a navigable river, the legal construction is, that it must be in subserviency to the public rights, and the common use of all the subjects of the realm, and even of foreigners.

None of the books I have consulted on the subject, and none of those cited in argument, have shown a case in which a grant of a navigable river or port vested in the grantor a right to the exclusive enjoyment of its use. The construction of wharves and other lateral erections, calculated to give facility to commerce and navigation, and to promote public convenience, have been authorized, in numerous instances, by acts of parliament, in *Great Britain*, and by acts of the legislature here. The opening of waters not navigable, or such as were imperfectly so, have sometimes given rise to the imposition of

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tolls, both here and in *Great Britain*. But no exclusive right of navigating has been granted to particular persons, or to vessels of a particular construction, or possessing certain properties, in either country; and it would seem that it was considered contrary to the *jus publicum*, that such a grant should be made.

The erection of bridges, and the establishment of ferries, across navigable rivers, are modifications of the *jus publicum*. They are all directed to the same object, the accommodation and convenience of the public. They, however, have no foundation in the law of nature; they are the effects of the invention and labor of man.

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If by the common law of *England*, navigable rivers, in which the tide ebbs and flows, were deemed consecrated to the common *use of all, as of common right, if no impediment or obstruction was to be admitted to impede the navigation, if a grant, which, by its terms, in all other cases, would have passed a fee, *usque ad cælum*, was, by the established construction of law, to glance from the surface of a navigable river, or attach to its bottom, and give only an exclusive right to the grantee, to catch the swimming fish, while within the bounds of his grant, if the common law was the law of all the states in the union, at the time the constitution was adopted, as it certainly was in this, it may be a question of very serious import, how far a particular state may detract from privileges and immunities, at common law incapable of annihilation or restraint, common to all, at the time the constitution was adopted, and regulated by principles which shielded them from every species of private appropriation.

The claim of the complainants is not founded on original invention. The mode of generating steam and its properties, were known as early as the seventeenth century; a patent for a steam-engine was granted in *England*, late in that century. Projects for propelling boats by steam have been under the public eye for near twenty-five years, as appears from the complainants' bill and the laws of the state, and the first act on the subject recognises the invention of a steam-boat by *John Fitch*. The combination of machinery, and the application of the power to give it effect, have been happily adapted to the propelling of vessels. It is a matter of public notoriety that they are now in a train of successful operation; and whenever the exertion of the ingenuity and perseverance which perfected them to the point at which they have now arrived, can become the legitimate object of judicial cognisance, the incalculable utility and convenience which the public experience from the invention, merit every consideration in favor of the inventors, which a court can possibly yield to, consistent with the correct administration of justice; but here they were not brought into view, and could have no weight.

The laws of the state alluded to have granted the exclusive right of using vessels impelled by steam, in the navigable waters of this state, to the complainants. Suppose this grant

valid ; if the legislature of this state could make an exclusive grant of that nature, could they not have extended it to vessels impelled *by the winds* or *by oars*, and to vessels of every other description, capable of floating? If they cannot, where is the line of distinction to be drawn between what has been granted, and what is *unsusceptible of grant? If carried to this extent, would it not be an abridgment of common rights? Could it comport with the constitutional provision, that the citizens of all the states are to have like privileges and immunities with the citizens of the several states? With whom are they to be ranked? With the class who hold exclusive rights in the state, or with the excluded class of citizens? If the most favored citizens are not to give the test, what proportion of the collective number of the citizens of this state are to constitute it? If a numerical calculation is to be admitted, are a tenth, a hundredth or a thousandth part to afford such test? Would it consist with the intent of the constitution of the *United States*, that any portion of the citizens of an individual state, described by their age, their occupations, or estates, should have the exclusive right of using the navigable waters of such state? Can the constitution be so construed as to give rights to the citizens of all the states, superior to the rights of that state in which they are to be exercised? Or was the second section of the fourth article intended to secure equal rights to all? And should the grant in this case partake of the nature of a contract, could its consideration be legally carved out of the *jus publicum* of the citizens of the *United States*?

These are questions which, at the first blush, must appear of much moment ; certainly too much so to admit of being determined without the fullest investigation. *Without meaning to decide upon any*, the mere propounding them must carry conviction to every mind, that the subject is involved in much doubt and difficulty, and that, from its novelty, its importance and perplexity, it constitutes a case incapable of being considered so clear and plain as not to admit of doubt, which is the only ground upon which an injunction could have been then granted on the bill of the complainants.

The acts recited in the complainants' bill show that the grant under which they claim, and the penalty prescribed for violating their exclusive right, were coeval ; the same act which granted the one having created the other. There was no pre-existing common law right, at the time those acts were passed to which the statute remedy might be deemed accumulative.

The authorities cited to this point were chiefly criminal cases ; but the analogy between those and civil cases is strong, and so recognised in some of the cases as to this point ; and I inclined to the opinion that the sanctions prescribed by the acts could not be exceeded. The first point, however, operating against the granting an *injunction, it cannot be useful to enter into a particular examination of this ; nor could the possession relied on be of any avail to the complainants, on their motion ; their title being set forth and appearing doubtful,

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which was not the case in *Bolton v. Bull* (3 *Ves.* jun. 140) and *Harmer v. Plane*, (14. *Ves.* jun. 130,) adjudged since the revolution, and much relied on in argument. Both those cases arose on conflicting claims between original inventors and claimants under patents for improvements. The patents were admitted. In the first case, the patentees had been in possession, for twenty-seven years, of their patent rights. In the latter, it would seem, from Lord *Eldon's* opinion, that the possession under color of the patent had been so reasonably long and undisputed, as to be deemed an evidence that the public had acquiesced in the enjoyment of the right. But in this case the validity of the original grant on which the possession is to be bottomed was the object of controversy.

A number of other points were made, and some of them argued with the greatest zeal and ability; but they did not come within the range of my opinion. They were disregarded, because a decision on them could not have altered the result; and I thought this a case in which it was highly expedient that every question not indispensably necessary to be determined upon, in order to dispose of the motion, should be left for ulterior consideration, if the prosecution of the bill should require further judicial investigation.

Upon the whole, I was clearly of opinion that this was a case in which an injunction ought not to be granted, in that stage of the cause, and that the complainants should take nothing by their motion.

The counsel for the appellants stated that they should contend that the order of the chancellor ought to be reversed; because,

That by the laws of the state, the appellants are invested with an exclusive right to navigate the waters of this state, by steam; and that they are entitled to the interposition of the Court of Chancery to restrain the respondents, who are violating that right:

That by one of those laws, passed in the year 1808, any boat violating their right becomes forfeited to the appellants, and they are, therefore, entitled to an injunction:

That the steam-boat called the *Hope*, employed by the respondents, and mentioned in the bill, in consequence of the forfeiture, is the property of the appellants; and the appellants have, therefore, the same right to the interposition of the Court of Chancery, to restrain the respondents from the use of it, that they would *have a right to the like interposition in case the respondents were in possession of any other property of the appellants, and were using it, to the prejudice of the appellants, as well as from the wear and danger to which the boat is liable, while it is permitted to navigate:

3. That in every government there must be a supreme or sovereign power, which has the entire authority of shutting up and regulating rivers and roads. This supreme power has never been ceded to congress, and must, therefore, of course, re-

main in the state, which alone is the judge of the expediency of exercising it:

4. That the waters within the territory of the respective states are the property of the states, and that the legislature of this state has as great power over its territory as an individual has over his property; and has as much right to regulate or restrain the use of an invention, in the territory of the state, as an individual would have to prohibit the use on his own property:

5. That the grant to the appellants is a solemn contract made between them and the state, by which the state, for a valuable consideration, bound themselves to give the appellants the exclusive privilege which they claim. The appellants have faithfully performed the contract on their part, at very great expense and hazard, and are, therefore, entitled to the benefit promised them by the state:

6. That the subject of their grant or contract, with the state, is such as is capable of being granted, or respecting which a contract may be made:

7. That even were it possible to suppose the title doubtful, still, according to the invariable practice of the court, the appellants are entitled to an injunction, to quiet a possession taken by virtue of a statute, (or, indeed, of any matter of record,) till by a trial at law, or an issue directed by the Court of Equity, the opinion of the judges is had thereon:

8. That the rule in equity is to protect a possession, held even without a title, till a better right is shewn, by a trial at law, if the possession has been for three years or upwards; a title being, in such case, presumed:

9. That in the case of the appellants, their title under the law is not disputed by the court or the parties, but the doubt raised by the chancellor is on the validity of the laws, or the right of the *state to make the same. The possession, in such case, must revert back to the time when the state first exercised the right to grant exclusive privileges, in its waters, of a similar nature, which, (without noticing other exercises of this power, at a very early date,) but confining it to steam-boats, is as far back as the grant to *John Fitch*, a period of such length as would protect a possession, even at law, against an ejectment, and entitle any possessor to an injunction on the mere possession:

10. Because even if the power of invalidating the right of the state lay with congress, or the citizens of other states, the defendants, being citizens of this state, could not avail themselves of this pretence for disturbing the possession of the appellants: neither the courts of law nor equity permitting the title of a stranger to be of any avail, except to those who deduce a title under such stranger:

11. Because, whatever may be the common law, relative to navigable waters, and the rights of citizens of other states therein, in virtue of the federal constitution, the law was altered in this state, and in several others, relative to steam-boats,

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the exclusive use of which was vested in *John Fitch*, before steam-boats were in existence for the common law to operate upon, and several months before the federal constitution was adopted :

12. Because the Court of Chancery has founded its doubts upon an erroneous construction of the privileges supposed to be granted by the confederation, or the present federal constitution, to the citizens of the respective states, in the waters of the state, and which, even if correct, would not apply to the case of the defendants, who are citizens of this state :

13. Because the legislature represents the people of the state, as the constitution and the very style of the laws declare ; that the defendants are, therefore, parties to the law, and have, as such, participated in the advantages, that both the law and the Court of Chancery declare have been derived to the people of the state, from the contract made in their behalf by their representatives, and have no right to nullify their own act : and upon this ground the appellants are entitled to the aid of the Court of Equity to enforce a specific performance of their agreement :

14. Because the law forfeiting the boat, vests the property as soon as it has begun to navigate, and is a compensation for the *first offence only* : and for all subsequent injuries, by a continuance of the wrong, the appellants have no remedy but an injunction to stop the repetition of them :

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*15. Because, even if the appellants might recover damages at law, which is very doubtful, yet it could only be by a multiplicity of suits ; (every trip of the boat affording ground for a new suit ;) and it is the established practice of the courts of equity to grant injunctions in order to prevent a multiplicity of suits :

16. Because it is the practice of courts of equity to *prevent* damages, and not leave a party first to be injured, and then send him to seek a compensation at law :

17. Because it is the practice of the courts of equity to control the operation of forfeitures or penalties, where they do not make the object of the contract, but are held up *in terrorem*, and to inquire into the intention of the parties, and enforce the agreement according to such intention, and more particularly where the forfeiture is inadequate, or does not extend to the whole offence :

18. That an injunction, by the established law and practice of the courts of chancery, ought to be granted in each of the following cases : 1. Where the complainant has a clear legal right, or an equitable one, founded on the particular merits of his case ; 2. When he claims by record, or under an act of the legislature ; 3. Where, without an injunction, he might sustain an irreparable injury ; 4. Where the party has been any time in the enjoyment of the right he claims ; 5. Where he claims a specific remedy ; 6. When the legal remedy is inadequate, if he has one ; 7. Where he has no remedy at law but a multiplicity of suits ; 8. Where the equity is

clear, but the chancellor has doubts as to the legal title. In such case, it is the invariable rule to quiet the possession till the doubt is cleared up by an issue at law, under the direction of the court.

In the present case all these claims upon the court for an injunction are united. The appellants have a clear right: they claim under an act of the legislature: they sustain irreparable mischief, while their right is violated, and the boat to which they are entitled, is withheld from them: they have been for a length of time, in possession: they claim a specific performance of a contract: they require the aid of the court to prevent a multiplicity of suits: their equity is clear: they are, therefore, entitled to an injunction, till the chancellor's doubts are cleared up at law.

The respondents' counsel, on the other hand, stated that they should insist that the order of the chancellor ought to be affirmed:

1. Because, the acts of the legislature of this state, in favor of *the appellants are repugnant to the constitution and laws of the *United States*; and, therefore, gave no rights to the appellants, upon which the relief, or injunction sought by their bill, could be founded:

2. Because, admitting the validity of those acts, the appellants were not entitled to any other remedy than that prescribed by the legislature:

3. Because, if the injunction issues, and the appellants have no right to the exclusive privilege they claim, the respondents are without any redress for the injury they must necessarily sustain; whereas if the appellants have the right, they have a complete remedy against the respondents for whatever damages they may suffer by a violation of that right:

4. Because an injunction never ought to issue until the right of the party applying has been first settled at law, unless to prevent an irreparable mischief:

5. Because, in this case, the injunction will not prevent, but may create, an irreparable mischief.

Hoffman, (*Colden* and *Riggs*, on the same side,) for the appellants; 1. This state has power to grant exclusive privileges, and particularly an exclusive right to navigate the waters within its jurisdiction. This power is inherent in every sovereign, and in every regular government; it is a power which may be most beneficially exercised for the promotion of industry, enterprise, commerce, science and the arts. *Canals, toll-bridges, turnpikes, ferries, public markets, &c.* are all exclusive privileges, which have always been granted, whenever the sovereign power of the state has thought them expedient. The expediency of granting them does not affect the right. It rests exclusively in the discretion of the legislature to grant or withhold the privilege. The *navigable waters* of the state do not limit the exercise of this power, nor can they, by any *public law*, as has been suggested, control the sovereignty of the state. Lord *Hale*, in the treatise published by *Hargrave*,

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(*Harg. Law Tracts*, 60—67. 71—73,) admits that the parliament may control the *jus publicum*, as to navigable waters, though the king cannot.

Parliament, in *England*, may obstruct or destroy a port. So may the king erect a new port, and dissolve it. He may prohibit the entrance into certain navigable waters, unless *tolls*, &c. are paid. He may do many things in relation to ports and navigable waters; but there are other things in relation to them which can *only be done by act of parliament. The power of the king is limited, in this respect, but not that of the parliament. But even the king may do as much as has been done by the legislature in the present case. This state has sovereign power over all its territory, over the water as well as the land; and uniformly exercises equal power over both. The grant to the *Duke of York* includes the *Hudson* river, *eo nomine*, and the charter grants the *Hudson* by name. Under that grant one third of the property of the state is held. Our laws relative to the claim of *New-Jersey* are founded on the right derived under this grant. All the citizens of the *United States*, no doubt, are free to use the *Hudson*. They have a *usufructuary* right in that river; for it is a public highway; (*Palmer v. Mulligan*, 3 *Caines' Rep.* 307;) but does not the legislature regulate highways, establish turnpikes and toll-bridges, so that they cannot be passed without paying such tolls, and conforming to the regulations established by the legislature? Exclusive privileges, as to driving public stages along certain roads, have been granted by the legislature; (*Sess.* 20. c. 70. *Sess.* 26. c. 20. *Sess.* 27. c. 37;) and the citizens of other states as well as our own are compelled to submit to those regulations. The constitution of the *United States* (art. 4. s. 2) provides only that the citizens of other states shall have equal privileges and immunities with our own. They can possess none other or greater. The state has exercised rights of property as well as jurisdiction over its waters. It, every day, grants land under the water of the *Hudson* for wharves. One third of the city of *New-York* is built on land formerly covered by the *Hudson*. Grants of *ferries* are, *pro tanto*, exclusive grants of the water. The appellants claim only a usufructuary privilege; and that others should be prohibited from interfering with its exercise.

Air and *water* are free, but they are not to be used to the public injury; and the legislature may interfere to regulate their use, to prevent public injury, or to promote the public good. Is not the legislature, in this respect, omnipotent? Who can control it, unless by the provision of the constitution? The *English* parliament is deemed omnipotent. (1 *Bl. Com.* 108, 109.) And the legislature is equally absolute and despotic, except where it is restrained by the constitution.

But it will be said that the acts in question are against the constitution of the *United States*, and, therefore, void. Every presumption is in favor of these acts, as they have been passed by different legislatures, from 1793 to the present time. A

succession of legislatures, governors and chancellors have considered *them constitutional; and the last act, of 1811, was passed, after the question as to the constitutionality of the other acts was agitated.

The power vested in congress "to regulate commerce with foreign nations, and among the several states," (art. 1. s. 8,) does not prohibit the regulation of internal commerce within the state. If it did, it would be equally applicable to the land as to water; and the legislature could not establish turnpikes, toll-bridges or ferries, &c. which might affect the commerce with neighboring states. But if a certain description of wagons were required, for example, in the county of *Rensselaer*, would not the wagons coming from *Vermont* be bound to conform to the regulation? So a ferry across the *Hudson* may be established, which may require all travellers or passengers to cross in particular boats, and all persons must submit to the regulation.

The regulation of commerce with foreign nations means the establishing of duties of impost, tonnage, non-intercourse, embargoes, quarantine, &c. But there is nothing in the language of the constitution which gives this power exclusively to congress, in cases where it can be exercised concurrently with the states. Congress may prohibit the importation of slaves; and so may a state; and this state has prohibited their importation. The state cannot lay any duties on imports, or exports, or tonnage, because it is expressly prohibited. Vessels approaching our harbors from sea must submit to the laws of congress, relative to the custom-house; but when arrived within our jurisdiction, they are subject to our municipal law. Thus, the master of every foreign vessel is required, by statute, to report the passengers to the mayor of the city of *New-York*.

Again, congress has the power to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

Why is not this a concurrent power with that of the several states? Before the adoption of the constitution, the states granted these exclusive privileges; and there is nothing in the constitution which prohibits the states from granting them now. By granting a patent, congress gives the exclusive right as to the whole *United States*, that is, the *right of property* in the invention or discovery, &c.; but not an unlimited and uncontrollable power to *use* that right. A mere naked right of property does not imply the unlimited power of using it. Its use must be subject to the laws and under the control of the several states. The legislature restrains the use or enjoyment of property in dogs and other animals. The property *of an individual may be taken for public purposes, without his consent, as for roads, fortifications, &c. The interests and policy of the different states may, and do, differ from each other. What may be deemed

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be thought improper and injurious in another. An author may secure a copy-right in a book relative to negro slavery, the sale of which might not only be considered innocent, but meritorious in this state; while, in *Virginia*, it would be regarded as highly dangerous, and of the most mischievous tendency; and could not the legislature of that state prohibit the sale of it? Has not the legislature a right to restrain or prohibit the sale of an obscene, immoral, or blasphemous book, or a noxious medicine, within this state, though the author or inventor may have secured an exclusive right in them, under the law of congress? An author, or a patentee, may acquire a right of property under the law of congress; but it must be used agreeably to the municipal laws of the several states.

Because, in certain *possible* cases, such state laws may infringe or impair patent rights, we are not to declare every law of the state, relative to exclusive rights, unconstitutional and void. It will be time enough to decide upon such supposed cases when they arise. Whenever a conflict occurs between one individual claiming under the state, and another claiming under a patent right, then the question of constitutionality may be properly discussed.

Every word of the constitution has its proper, precise and definite meaning. That instrument was framed by the wisest men, and with the greatest care. Every clause underwent discussion, and was subjected to the strictest and most jealous criticism.

It is, moreover, declared by the tenth article of the *amendments* to the constitution, that the powers not delegated to the *United States* by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Certain powers are expressly given to congress; others are expressly given to the states

All power not, in its own nature, *exclusively* vested in congress, or not expressly prohibited to the states, remains *concurrent* in the states. The eighth section enumerates the powers given to congress, and the tenth section those prohibited to the states. Some of the powers given to congress are necessarily exclusive; as to exercise jurisdiction over a certain district of ten miles square; to declare war; grant letters of marque and reprisal; borrow money on the credit of the *United States*, &c. Other powers are *concurrent*, as *to lay taxes; to punish counterfeiting the securities or coin of the *United States*, to punish certain offences against the law of nations, &c. The prohibitions to the states are a negation of the express powers before given to congress. To grant letters of marque and reprisal seems to be a power, in its nature, exclusive, and yet it is expressly prohibited to the states.

In *Collet v. Collet* (2 *Dallas' Rep.* 294) it was decided by the Circuit Court of *Pennsylvania*, that the individual states had concurrent jurisdiction as to *naturalization*, provided the law of the state, for that purpose, did not contravene any rule established by the authority of congress. So the individual

states may pass *bankrupt* laws, provided they do not interfere with the laws of congress. Congress has the power to lay and collect taxes, duties, imposts and excises; but the states are prohibited from laying duties on imports and exports. This state lays an excise, and duties on sales at auction.

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The principle for which the appellants contend is of the greatest importance. It affords the only safe construction of the constitution of the *United States*, and is fortified and supported by the tenth amendment.

The power of granting patents or exclusive privileges not being, in its own nature, exclusive, nor *expressly* prohibited to the states, remains in the states, and may be concurrently exercised by them. But suppose the patent power in congress to be exclusive. On what is it to operate? It is limited, in its application, to *authors* and *inventors*. There cannot be a patent for a thing before known. The object of the patent must be the patentee's own invention, otherwise, the patent is void. It is different in *England*, for there a patent may be granted to the importers of useful inventions and improvements. This is a *strict* power in congress, and cannot be extended. Congress cannot grant an exclusive privilege or monopoly. Suppose the art of making china or tapestry were to be brought into this state, and the encouragement of an exclusive privilege was requisite to induce the person to risk the expense and labor of establishing the manufactory: congress could not grant the privilege, because the art is already known; and the state cannot interfere, it is said, because it would be an infringement of the *jus publicum*; or because, forsooth, hereafter, some person may obtain a patent from congress for some improvement in the machinery. And is the state to forego all the advantages to be derived *from works of great public utility, because there is a latent power in congress which may hereafter be exercised on the subject? There must be somewhere a *sovereign power* adequate to afford the requisite encouragement to such works. If it does not reside in congress, who can grant patents only, nor in the state, where does it reside? Can any portion of the sovereignty be in *abeyance*? The power does not remain in the people at large.

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The appellants set up no right under a power granted by the constitution to congress. The bill exhibits nothing interfering with the powers granted to the *United States*. The appellants do not, in their bill, pretend to any invention or discovery; but merely that they *possessed* the means by which boats might be propelled by steam; and they ask only to be secured in the privilege of making the experiment. The right granted to *Fitch* was not a patent right. The language of the other act is, "to the end that *R. R. Livingston* may be induced to proceed with his experiment." The court are not to look or inquire beyond the facts stated in the bill. The act has all the properties of a grant of a *ferry*, except that it does not oblige any person to go in the boat. Whether the passage be up and down the river, or across it, it is the same, in effect. Sloops

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and other vessels are as free as ever to pass to and fro, and to carry as many passengers as they can obtain. The steam-boats of the appellants merely claim the advantages of superior accommodation and greater speed. After great hazard, and immense expense, the experiment has fully succeeded; and it is that success which has given rise to the present controversy. The appellants have endured all the ridicule and contempt cast upon them, as rash and chimerical projectors; and now when they are just about to reap the fruits of their enterprise, the respondents seek to deprive them of the honor and profit of the establishment.

The argument of the respondents is, that a patent *may* be granted with which the act would interfere. But the respondents cannot obtain a patent for their boats, for they are not the inventors. And when the constitutional question does arise, the patentee may show his right, and the act, so far as it interferes with the patent, must yield; but it will still be in force so far as it does not interfere with the patent right.

No *answer* has been put in to the bill. Suppose an answer should be filed stating that the appellants are not the inventors, but had borrowed this improvement. The question as to the constitutionality *of the state law could not then arise, for the fact of invention is not alleged in the bill.

But the legislature most clearly had a right to pass the law, for congress had not the power to grant a patent or exclusive privilege in this case.

2. Then, is not the writ of injunction the proper remedy for the appellants?

Before the reign of *James I.* the King of *Great Britain* claimed the right, by royal prerogative, to create and secure exclusive rights and privileges. The parliament, however, denied and resisted the royal claim to create franchises and monopolies. This power had been exercised by *Elizabeth* and her successors, to a great extent; but by an act of parliament passed in the 21 *James I.* c. 3, all monopolies, grants, letters patent, &c. for the exclusive selling, &c. were declared void, with certain exceptions, among which are patents to first inventors, for the term of fourteen years. (4 *Bac. Abr.* 766. tit. *Monopoly*.) This statute gives the monopoly to the first inventor, though the thing had been before known or practised beyond sea. But the act of congress is confined to the inventions of the patentees themselves.

The statute of 8 *Anne*, c. 19, first secured to authors and their assigns, the sole right of printing and reprinting their works, during the period of fourteen years; (2 *Atk.* 141;) and any person printing the book, without the consent of the author, forfeited the books, and one penny for each sheet in his custody. The statutes of 8 *Geo.* II. c. 13. 7 *Geo.* III. c. 38. and 17 *Geo.* III. c. 57, extended the same privilege to the inventors of prints and engravings. (2 *Atk.* 94.) The act of congress, passed the 31st of *May*, 1790, is almost a transcript of the statute of *Anne*. The books printed in violation of the author's right

are forfeited to him, and he may destroy them ; it also gives the penalty of fifty cents for every printed sheet.

As to rights flowing from the mere exercise of *prerogative*, injunctions, in *England*, have been refused, in the first instance. This proceeded from that jealousy of the royal prerogative, which still existed, as in the reign of *James I.* Yet injunctions have sometimes been granted by chancellors favorable to the crown ; or in cases of franchises, markets, books, &c. But since the statute of *James I.* there is not a case to be found, in which an injunction has been refused, in the first instance, to protect the statute right : nor is there an instance of such refusal to protect authors under the statute of *Anne*. Injunctions as to *prerogative* *rights, have sometimes been granted and sometimes refused ; but there is no case where they have been refused as to *statute rights*. Though the *English* courts are jealous of the *crown*, yet where the rights flowed from *parliament*, courts have uniformly and promptly supported them.

The *anonymous* case, 1 *Vernon*, 120, was that of a prerogative right. The application was made by the patentees of the king, to stop the sale of bibles printed abroad ; and a trial at law was first ordered. The case of the *East-India Company v. Sandys* (1 *Vern.* 127) arose under the *East-India Company's* charter, which was a royal patent. The defendant was an interloper, and the chancellor refused the injunction. In *Hills v. University of Oxford*, (1 *Vern.* 275,) the plaintiffs were *king's* printers under patents from the crown, and claimed against the university, to whom a patent had been granted in the 8 *Charles I.* for printing bibles, and other books not prohibited. The injunction was refused, and the matter sent to be tried at law, between the royal patentees. The *anonymous* case, in 1750, (1 *Vesey*, 477,) arose on a franchise of a ferry, and the distinction for which we contend is there adopted by the lord chancellor, that where the right is grounded on an act of parliament, an injunction will issue on the filing the bill ; but in special cases of rights derived from the royal prerogative, no injunction issues until the answer comes in, or the right appears by record to the court. Lord *Redesdale*, (*Mitf. Pl.* 129. *Coop. Eq. Pl.* 150—157,) in his *Treatise on Pleadings in Chancery*, states the rule to be, that in cases of this sort, it is not necessary to establish a right at law before filing a bill for an injunction, where the right appears on record, as under letters patent, for a new invention, which is by virtue of the act of *James I.* ; or in cases of bills brought by authors or their assignees, to restrain a sale of books, where the right, which is the foundation of the bill, is grounded on an act of parliament. If the party who has got his patent, puts his invention in execution, it is considered as a possession under it, however doubtful it may be whether the patent can be sustained ; and the court say, that possession under color of a title is ground enough for an injunction. (6 *Ves.* 707.) The statute grant is to be presumed valid, until impeached. Courts must act on that presumption. The party stands on that ground

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until he is removed. The burden of proof against his title to the possession, lies on the intruder. While doubts only are entertained, and while the party is attacked in his possession, he ought to be protected in that possession, until those doubts are *removed by legal investigation, and the truth established. The appellants do not ask to have their right established. It is for the respondents to shake or destroy it. Until this is done, they cannot disturb the appellants in the enjoyment of an express legislative grant.

In *Doolittle v. Walton*, *Smith v. Clarke*, and *Goodman v. Gallatin*, (2 *Dick.* 442. 455,) Lord *Bathurst* lays it down, that to prevent waste, working of mines, ploughing ancient meadows, printing books, and exercising new inventions, injunctions are granted, as of course, before an appearance or answer. In *Hicks v. Raincock*, (2 *Dick.* 647,) a bill for an injunction to stay the infringement of a patent right was demurred to, on the ground that the plaintiff had not established his right at law; and Lord *Bathurst* overruled the demurrer. The case of *Bolton v. Bull* (3 *Ves.* 140) is strong in point, on this principle. *Bolton & Watts* had obtained a patent for a *steam* engine, of which they had been in possession many years; and on filing a bill, an injunction was granted to restrain the defendant from infringing the patent, until its validity should be tried at law. In the Court of Common Pleas, (2 *H. Bl.* 463. See 8 *Term Rep.* 95,) a verdict was taken for the plaintiffs, subject to the opinion of the court, and the judges were equally divided in opinion. The chancellor nevertheless, continued the injunction, saying he would not put the plaintiffs to the acceptance of terms; nor put them out of the possession of their right, because the judges in the court at law had differed in opinion upon it. In the present case, to deny the injunction is to put the party out of possession, for their right is an entire and exclusive possession.

In *Harmer v. Plane*, (14 *Ves.* 130,) though considerable doubts were entertained as to the validity of the patent, on account of some defect in the specification of the improvement, yet the chancellor granted an injunction until the question on the patent should be tried at law. He said "that the question was not really between the parties on the record; for unless the injunction was granted, any person might violate the patent; and the consequence would be, that the patentee would be ruined by litigation." This course of proceeding is just and reasonable, and most conducive to the public good. If injunctions are not granted, in the first instance, patent rights would be useless; for few persons could endure to be deprived of their inventions, and, at the same time, bear the expense of endless litigation with all the world. Let those who set up a right in opposition first establish it, before they attack that of *others. The precedent to be set in this case concerns not the plaintiffs only. It will affect the cause of genius throughout the *United States*. Genius and poverty are too often allied;

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and what poor individual would dare to encounter the charge of resisting the powerful combination of interested men.

In *Gibbs v. Cole*, (3 *P. Wms.* 255,) Lord Chancellor *Talbot* granted an injunction, on filing the bill, and continued it after answer, though it was a patent from the *crown*, and not under the statute.

In *Gurney v. Longman*, (13 *Ves.* 493,) the plaintiff was appointed, pursuant to an order of the House of Lords, to take an account of the trial of Lord *Melville*, and no other person was to presume to publish it. The plaintiff having taken down the trial, and prepared it for publication, an injunction was granted to prevent the defendant from publishing an account of it, taken in the gallery. Though it was a case of doubt, as to the right, the *lord chancellor* granted an injunction, until the hearing; and he alluded to the same principle as decided by Sir *Joseph Jekyl*, and affirmed by the lord chancellor, in 1718.

In the case of the *Two Universities* in *England*, against *Richardson*, (6 *Ves.* 698—707,) which related to the sale of *bibles*, by the king's printer in *Scotland*, and involved the prerogative rights of the crown, the chancellor lays down the rule that an injunction, though the legal title be doubtful, will be granted and continued until the hearing, and he expresses his dissent from the *dictum* of Lord *Mansfield*, to the contrary, in the case of *Miller v. Taylor*.

Gyler v. Wilcox and others (2 *Atk.* 141. S. C. 3 *Atk.* 269,) was the case of a *copyright*, under the statute of *Anne*, and the chancellor directed a reference to two persons, and continued the injunction until their award was made. He said that it was not a case of monopoly; and that the statute ought to receive a liberal construction, being intended to secure the property to authors in their books, as some recompense for their labor in works of public utility. The case of *Whitechurch v. Hide*, (2 *Atk.* 319,) in which an injunction was refused, was considered as being a monopoly, and a very doubtful right claimed under a *franchise*, and not founded on any statute. It has, therefore, no analogy to the present case.

Bell v. Walker and Debrett (1 *Bro. Ch. Cas.* 451) was a case of doubtful right, yet an injunction was granted. *Cannon v. Bowles* (2 *Bro. Ch. Cas.* 81. See also *Faden v. Stockdale*, in note) was also a case of *copyright*. So, also, was that of *Jeffery v. Bowles*. (1 *Dick.* 429.) They did not arise on any common law right. So *Blackewall v. Harper* * (2 *Atk.* 98) arose under the statute of 8 *Geo. II.* as to engravings. The common law right does not apply to works of invention.

An injunction is an appropriate remedy for a violation of all statute rights. They are granted of course. The numerous cases decided before the revolution are conclusive on this point, and binding on this court. The remedy is contemporaneous and concurrent with the grant itself, and cannot be separated from it. The right and the remedy passed to the

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appellants at the same time. The remedy is a part of the grant and cannot be taken away.

But it will be said, on the part of the respondents, that this remedy is appropriate to common law rights. Though Lord *Mansfield*, in the case of *Miller v. Taylor*, (4 *Burr.* 2303—2399. *Ib.* 2379,) considered the *chancellors* who had granted injunctions, as proceeding on the common law right, yet *Yates*, J. was of a different opinion. He thought, with Lord *Hardwicke*, that the cases of injunctions were founded on the statute; the chancellors not undertaking to determine the general question as to the *common law* right. And the opinion of Justice *Yates* finally prevailed in the *House of Lords*, (4 *Burr.* 2408. 2417,) and an injunction was granted accordingly.

The penalty given by the statute is merely cumulative, and is wholly distinct from the right of property given by the act. (2 *Atk.* 93.) In *Pope v. Curl* (2 *Atk.* 342) the injunction was granted on the statute. Why should not a statute right be equally sacred, and entitled to equal protection as a common law right? Is not a right of property granted by the legislature, for meritorious services, equally valid, as if derived by inheritance?

If under a statute conferring a right, and inflicting a penalty, the party can, only recover the penalty, as a compensation for the violation of his right, the benefit pretended to be conferred would be empty and delusive. Though the respondents might lose their boats, they would make their fortunes, while the cause was pending from year to year, and removed from one court to another, in a course of tedious litigation. Such a construction would be a temptation to fraud and to the violation of law. The legislature has encouraged the appellants to proceed in their experiment, and to incur very great expense, at the hazard of their ruin; and the state is bound, in honor and good faith, to protect them against those who, without incurring any risk, now seek to deprive the appellants of the profits of a successful enterprise.

This is not a *penal*, but a *remedial* statute. (1 *Atk.* 141.) The penalty is cumulative; it is not given by way of compensation, but *in terrorem*; to *deter* others from a violation of the law. The act giving the **forfeiture*, was for the “better encouragement of steam-boats;” it does not take away or diminish the remedy. If the boats of the respondents are forfeited, *ab initio*, and the property in them vested in the appellants, (5 *Term Rep.* 112, 6 *Mod.* 216, 2 *Saund.* 47,) then a court of chancery will enjoin the respondents from using the property of the appellants to their prejudice. Are the appellants, after a lapse of years, to have nothing but the mere boats for their compensation? This notion has grown out of a decision in a criminal case, (*Castle's Case*, *Cro. Jac.* 644, 2 *Burr.* 1803,) that “when a statute creates a penalty for doing a thing which was no offence before, and appoints how it shall be recovered, it shall be punished by that means, and not by indictment.” In *The King v. Harris*, (4 *Term Rep.* 205,) the principle is 442

correctly stated by *Ashhurst*, J. that when a new offence is created by act of parliament, and a penalty is annexed to it, by a separate and substantive clause, the prosecutor need not sue for the penalty, but may proceed on the prior clause, on the ground of a misdemeanor. But there was a public offence, and being a criminal case, it is not strictly applicable to the present.

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The statutes of 8 *Anne*, c. 19, and 8 *Geo.* II. give forfeitures and pecuniary penalties, yet the remedies have been held to be cumulative. In the case of *Morse v. Read*, decided by Chief Justice *Ellsworth*, in the Circuit Court of the *United States*, held in this state, a perpetual injunction was granted, besides the forfeiture or pecuniary penalty. The act of congress is highly penal, for it gives treble damages; but these are only *in terrorem*. In a case decided in the Circuit Court of the *United States*, in *Georgia*, on a patent for a machine for cleaning cotton, a perpetual injunction was granted by Judge *Johnson*. In the case of *Usher*, who had a machine for making *soda water*, which was put into the hands of a mechanic to repair, who, afterwards, refused to return it and used it himself, Judge *Livingston* granted an injunction.

The right and the remedy are for ever inseparable. The right of the appellants was perfect before the act of 1807. The appellants having built the boats, and obtained the requisite certificate, their rights under that act were consummate. The act of 1808 is for the further encouragement of steam-boats, and gives the penalties in a distinct and substantive clause. Before that act, the right of the appellants, for twenty years, was complete and conclusive, as to the remedy, independent of the subsequent act giving a penalty. If the act of 1808 had not passed, could there be a doubt but that the appellants would have been entitled to the *remedy by an injunction, to protect them in the enjoyment of their right?

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In *Almy v. Harris*, (5 *Johns. Rep.* 175,) the Supreme Court decided that the plaintiff having no right at common law, his only remedy was under the statute. But this could not prevent the party from applying to a court of equity, if he had a right under the act to the ferry, for an injunction to prevent others from disturbing him in that right.

The acts of the legislature, separately or together, constitute a *contract* between the people of the state and the appellants; and in the last act, it is mentioned as a contract. The respondents are to be deemed parties to it. The appellants have a right to ask for a specific execution of the contract. The penalty is not to be considered as assessed damages; but is merely given to secure the enjoyment of the object. Where there is a suit on a covenant with a penalty, an injunction will be granted, until a final hearing of the cause. (1 *Bro. Ch. Cas.* 418. 5 *Ves.* 555.) In the case of *The City of London v. Pugh*, (4 *Bro. Parl. Cas.* 395. *Mitf. Pl.* 122. *Coop. Eq. Pl.* 156, 148. *Amb.* 694. 737,) the lessee covenanted not to dig up a particular part of the premises, &c. under the penalty of

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one hundred pounds for each acre; on a breach of the covenant the lessor filed a bill for an injunction, which was granted, and after answer, the defendant agreeing to appear and plead to an action at law, the injunction was dissolved; but on appeal to the House of Lords, the injunction was ordered to be continued until the final hearing of the cause. These cases clearly show that the penalty is not in the nature of a compensation, but merely an auxiliary remedy.

Wells and Henry, (Van Vechten, on the same side,) for the respondents; 1. The acts of the legislature under which the appellants claim, are contrary to the constitution of the *United States*, and, therefore, void. The appellants do not come here as inventors claiming the reward due to genius. They come with the spoils of genius not their own, and claim to be protected in the possession of what they have thus acquired. On the score of experiment and expense, the respondents have equal claims. The parties stand before this court on equal equity.

We contend that these legislative grants are void:

1. Because they interfere with the power granted to congress relative to *patents*.

2. Because they interfere with the powers vested in congress to regulate *commerce*.

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All the powers of congress are either exclusive or concurrent. *Where the power is, in its nature, exclusive, that exclusiveness need not be expressed; it is otherwise, where the power is concurrent. In all the cases of powers prohibited, the powers were otherwise concurrent. There are other cases where the powers are concurrent in part, and where the states may exercise the power, but only in absence of the exercise of the like power by congress; if congress act in the case, the states cannot.

The power to lay taxes is concurrent. The states may lay taxes as well as congress, for they are essential to the support of government. As to the power to lay duties on imports, &c. there is nothing, in its nature, exclusive; and the individual states are, therefore, expressly prohibited from exercising it. There is no prohibition as to paying public debts, or borrowing money on the faith of the *United States*, because those powers are necessarily and intrinsically exclusive. So the powers to regulate commerce with foreign states, and between the states; to establish a uniform rule of naturalization, and uniform laws of bankruptcy, are, naturally and impliedly, exclusive, for if the different states were to exercise those powers concurrently, it would introduce that infinite confusion and diversity which the constitution intended to prevent.

The decision in *Collett v. Collett* was idle and nugatory, if it was meant that the individual states may pass naturalization laws, in conformity to the laws of congress; but if it meant any thing more, it was clearly wrong; and the case was afterwards questioned by *Iredell, J.* in the *United States v. Villato*. (2 *Dallas' Rep.* 370.)

But a *concurrent* legislative power in the several states seems to be absurd. If exercised, it must be either in conformity with that of congress, or in enacting the same thing, and so nugatory, or else, in collision with, or contradictory to, the law of congress, and so void.

The true meaning of this part of the constitution of the *United States* has been stated and explained by a very able commentator, (*Hamilton*. See *Federalist*, No. 32,) an illustrious statesman and distinguished lawyer. He considers the power to establish a uniform rule of naturalization as necessarily exclusive, because if each state had power to prescribe a distinct rule, there could be no uniform rule on the subject. The power to coin money and regulate its value, and to fix the standard of weights and measures, to establish post-offices and post-roads, as they relate to the common concerns of society and the public good, may be exercised by the states, until congress *shall legislate upon those subjects. But as soon as congress have passed laws relative to those objects, there is an end to the state laws; they are superseded, and absorbed in the supreme law of the land. It is not necessary to an exclusive power in congress, that it should be given in express terms; it is sufficient that it is exclusive by necessary implication. The power of congress to grant copyrights and patents to authors and inventors, is given without any words of exclusion.* And congress have exercised this power, and made it, in fact, exclusive. The states cannot pass laws on the subject; for if they are the same as those of congress, they are useless and nugatory, and if different, they conflict with the power of congress, and must, therefore, be void. If one state might pass a conflicting law, so might every other. If this state stood alone, and as an absolute, sovereign, and independent state, no doubt it might grant monopolies and exclusive privileges, like the *British* parliament, which is said to be omnipotent; but as a member of the union, its power is subordinate to that of the *United States*.

Congress have prescribed the manner of acquiring and enjoying the property, and its duration. There has been a plenary exercise of power on the subject. There is nothing remaining on which the states can legislate. If powers can be exercised by the states and by congress, without conflicting, then they are concurrent, otherwise not. There must be a conflict of authority, if the several states act on the subject. Different states may pass different acts, disagreeing with those of congress, and with each other. This was one of the evils under the old confederation, and which the new constitution was intended to prevent. Every state passed laws on the same subject, and thirteen different rules or sets of regulations prevailed. The states have, by mutual consent, transferred the power to congress, to whom it necessarily, and of right, belongs. The sixth section of the act of congress relative to patents, is a legislative commentary on the constitutional power. It declares that where any state, before the adoption

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of the constitution, had granted an exclusive right to any invention, the party claiming that right should not be capable of obtaining an exclusive right under that act, unless he relinquished his right under the particular state ; and his obtaining an exclusive right under the act of congress, is declared to be sufficient evidence of his relinquishment of any right under the state. The constitution could not take away a right vested before its adoption. The individual might continue *to enjoy it, or exchange it for a more extensive privilege under the *United States*.

It is said that the states may restrain or prohibit the exercise of a patent right within their several jurisdictions ; and the cases of noxious drugs and seditious books have been mentioned as examples. It is not pretended that such things could be vended under any law.

Every man must use his property in such a manner as not to injure another. Because a man has no right to ride over his neighbor's field without his consent, it does not follow that his horse is not his own, and that he may not ride him on the public highway.

A patent for an invention grants a property in the subject, and a right to use it coextensive with the jurisdiction of the granting power, otherwise the right is imperfect. A state cannot, in direct terms, prohibit* the exercise of a patent right within its jurisdiction. It can only be restrained or prohibited, indirectly, as dangerous to the public health, policy or morals, under the municipal laws. It is admitted that the patent rights must be used in conformity to those laws ; but the total restriction of their use is a direct contravention of the authority of congress.

It is said that the states may grant turnpike roads, bridges, ferries, &c. ; and their right to legislate on these subjects of municipal regulation is not denied. But suppose a state law should prohibit the mail coach of the *United States* from passing a toll-gate or bridge, would it not be in contravention of the power of congress, and therefore void ? Could a state prohibit the *United States* from establishing a custom-house, or sending a tax-gatherer within its jurisdiction ?

It is said that the act of the legislature is a grant, in the nature of a *contract*, and not a patent. But it wants all the essential features of a contract. It is gratuitous, without reciprocity or mutual obligation ; no time is limited for building the boats, nor is there any mode by which the state could compel a performance. It is a mere *permission*. If there was a contract with *Fitch*, then it could not be dissolved without his consent. The word *contract*, foisted into the late act, will not alter the case. The notion that the respondents are bound by this supposed contract, as having been entered into between the people or their representatives, on the one part, and the appellants on the other, is much too refined to be acted upon, and would lead to results the most extravagant and unjust. It is a doctrine too absurd to be sanctioned by a court of justice.

*Again, it is said that although congress have the power to grant exclusive rights to authors and inventors; yet this act, not being a reward or grant to an inventor, does not interfere with the power of congress. The appellants claim only as *possessors*. But if the appellants had claimed to be the *inventors*, could this state have granted to them this exclusive privilege? Shall they, by changing their character to that of a *possessor*, obtain it? Certainly not; for the whole patent power in congress might, in that way, be defeated. The state by granting such privileges to *possessors*, would exercise a power superior to and far more extensive than that of congress. Is the mere possessor to be preferred to the inventor? The object of exclusive privilege is to secure to genius the fruits of its exertions, and to the public the benefits flowing from these intellectual labors.

Suppose a new method should be discovered of propelling boats by steam, with tenfold velocity, and with superior convenience to those of the appellants; yet if the appellants are to prevail, so useful a discovery could not be put in practice. If the whole field is thus preoccupied, what incentive is there to men of genius to exercise their powers for the benefit of mankind? The acts are impolitic, as well as unjust and unconstitutional. Congress only grant to inventors a privilege for fourteen years; this legislative grant is for thirty years, and may be extended to one hundred years, or for ever. It is an *unjust monopoly*. The appellants claim this monopoly against all the world, and the respondents, though not patentees, have a right to call their claim in question.

2. These acts interfere with the power of congress to regulate commerce, &c. This power involves the subjects of commerce, as well as the mode of carrying it on. It extends over and pervades all the states. The acts give to the appellants the exclusive right to use their steam-boats on all the waters of the state. It is not confined to any particular river or stream. The state might equally have granted an exclusive right to use sail-boats or row-boats, or boats propelled by any other physical power. The acts are penal, and grant a forfeiture of steam-boats used by others to the appellants. Suppose a steam-boat from *Canada* is found on any of the lakes within the territory of this state; or suppose a vessel, propelled by steam, arrives from any foreign port, or from the state of *New-Jersey*, for the purpose of passing through the sound to *Connecticut*, or elsewhere, could it be seized by the appellants, as forfeited by these acts? Would not this *interfere with foreign commerce, as well as the commerce between the states? Suppose the use of sails should be discontinued, and all vessels be propelled by steam, a thing in the imagination of the appellants not improbable, could no vessel enter this state, without their permission, under the penalty of being forfeited? Would not the power of congress to regulate commerce be defeated? It is enough for the respondents, if the monopoly granted to the appellants may interfere with the power of congress to regu

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late commerce, and if all vessels should be propelled by steam, that it would wholly defeat that power. The possibility or probability of this consequence, is sufficient to test the principle of this legislative grant; and the general principle may as well be settled now as at any other time.

Next as to the *remedy*, by injunction, in this case. The statute which grants the right, has also given the remedy. If the party claims a statute right, he must take the statute remedy; not claiming a right at common law, he is not entitled to a common law remedy. It is said that rights created by statute, are equally sacred and entitled to the same favor as those at common law. But common law, founded on the wisdom and experience of ages, is entitled to greater favor and respect than a statute, passed hastily, and unadvisedly, perhaps, or under the influence of the prejudices and feelings of the times, or of a party. The genius of the common law is opposed to *monopolies*. It breathes a purer spirit of liberty and justice. The remedy given by the statute is the forfeiture of the boats; and whether they are forfeited or not, is a question to be decided by the common law, not in a court of chancery. By an injunction, the appellants seek to acquire all the benefits of the forfeiture, before their right is established. The trial must be at law. If it should be decided that the appellants have no right, the injury which the respondents may have sustained by the injunction will be great and irreparable. The impropriety of the interference of chancery will be manifest. If the appellants prevail at law, they recover not only the boats, but *damages*, (3 *Bl. Com.* 152. *Cro. Jac.* 682,) of which the profits or earnings of the boats will be the measure. The statute then gives ample remedy, and there is no need of an injunction. If, after the right of the appellants has been settled at law, the respondents should persevere in violation of that right, it will then be time enough to apply for an injunction to prevent any future infractions. Where a new right is created by a statute which gives a remedy, that is the **only* remedy to which the party can resort. It would be otherwise, if there had existed an antecedent right or duty at common law. The statute remedy would then be merely cumulative; but the appellants can have no other remedy than what the statute has given them. The cases (1 *Saund.* 135, and note (1) (4). *Cro. Jac.* 644. 2 *Burr.* 803. 4 *Burr.* 2323. 2351. 2406, 2407. 2 *Salk.* 460. 4 *Term Rep.* 202. 3 *Term Rep.* 444. 5 *Term Rep.* 544. 5 *Johns. Rep.* 175) which support this principle are said to be criminal; but the analogy between criminal cases and civil rights founded on penal statutes, is perfect, in this respect. The rule is the same and must apply to both. All the acts, on this point, being *in pari materia*, must be taken as one statute, and it is, therefore, no objection to the application of the rule that the first statute gives no remedy.

It is a general principle, that no party can come into a court of chancery, in aid of his rights, until those rights have been first established at law. (1 *Atk.* 282—284. 1 *Vern.* 120. 448

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129. 275. 308.) There is no foundation for the distinction suggested, between rights flowing from the royal prerogative, and those derived from parliament. The right, in either case, is equally valid. The exercise of *state* power may be looked upon with as much jealousy as the exercise of *prerogative*. The exclusive right granted to the appellants is a *franchise*, or *monopoly*, and not entitled to any peculiar favor.

The opinion of Mr. Justice *Yates*, (*Miller v. Taylor*, 4 *Burr.* 2303. 2324—2328. 2407—2417. *Donaldson v. Beckett*, 2 *Bro. C. C.* 129,) as to the rights of authors, did not prevail in the House of Lords. They reversed the judgment below, on the ground that the common law right was abridged or taken away by the statute; and that the author had no other right or remedy than what is founded on the statute. *Eight* out of the eleven judges, who gave their opinions on the questions stated by the lords, were in favor of the common law right; but five out of six were of opinion that it was abridged or taken away by the statute of 8 *Anne* (a). *Yates*, J. denied the *property* of authors at *common law* altogether.

But there are several cases since the statute of *Anne*, in which injunctions have been refused. (4 *Burr.* 2327. 2 *Atk.* 141. 5 *Ves.* 24. 8 *Ves.* 215, in note.) The true and reasonable rule, undoubtedly is, that the party should first establish his legal right, before he asks a remedy. An injunction is intended to quiet the *party in the possession of his right. The rule contended for by the appellants inverts the natural order of proceeding. It administers the remedy before the right is ascertained. The plaintiff must prove his debt before he is entitled to execution. That injunctions should not issue before the right of the party is established, is a principle of the *English* law, settled anterior to the *American* revolution. The few instances in which injunctions were granted before the right was ascertained, were in particular and extreme cases, in order to prevent irreparable mischief. Such was the case relative to the publication of the letters of *Pope*. In the case of *Thompson and others v. Stanhope*, the publication of the private letters of Lord *Chesterfield* might have been an irreparable injury to many living persons. In *Melville's case*, the property had been stolen, fraudulently and piratically. If the *English* Court of Chancery has laid down a different rule, since our revolution, this court is not bound to adopt it. It ought to preserve the law as it then stood, in its primitive purity.

In *Gurney v. Longman*, (13 *Ves.* 493,) Lord *Eldon* expressed great reluctance to granting an injunction, until the right was established at law; and he granted it, under the peculiar circumstances of that case. In *Field v. Jackson* (2 *Dick.* 599) the chancellor refused an injunction to stay waste, because the right was doubtful. It arose upon the construction of an act of parliament, which was doubtful; and, therefore, he would not grant it.

In *Hogg v. Kirby*, (8 *Ves.* 215. 224,) Lord *Eldon* sanc-

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(a) Lord *Mansfield* being a peer, gave no opinion in the House of Lords; but it was understood that he adhered to the opinion expressed by

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him in the Court of K. B., that authors had a *legal property* in their productions, independent of the provisions of the statute; so that the twelve judges were, in fact, equally divided on this great question; and, as the opinions are stated by *Burrow*, seven of the judges, besides Lord *Mansfield*, were in favor of the *perpetuity* of the common law right, though *Nares* and *Gould* agreed with *Eyre*, *Perrott*, *Adams* and *De Grey*, that it had been abridged or taken away by the statute.

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tions the observations of Lord *Mansfield*, in *Miller v. Taylor*. The principle on which injunctions had been granted was, that damages did not give adequate relief. The chancellor either examines the books, or refers them to a master, to report whether there has been a piracy or fraud in the second publication, and an injunction issues if such appears to be the fact.

The principle on which all these cases of injunctions proceeded, is founded on the doctrine in the case of *waste*. For the destruction of trees planted by an ancestor, and consecrated to the affections and feelings of a family, no damages can afford a compensation.

In the present case, full compensation in damages can be obtained. All the profits made by the respondents may be recovered by the appellants. But if it should be found that the respondents have the right, an injunction would work an irreparable mischief to them, for they never could obtain an indemnity from the appellants.

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**T. A. Emmet*, in reply. It has been properly admitted by one of the counsel for the respondents, that if the right of the appellants was valid, the remedy followed of course. The question involved in this cause, though of great importance, is nothing more than a question of *property*. This court is not called upon to examine into the wisdom or expediency of these acts of the legislature, nor as to the policy of monopolies. Such an inquiry would be altogether extrajudicial. Be the laws ever so impolitic or unwise, it is the duty of this court to pronounce upon them as they find them. Much the greater part of the arguments of the learned counsel on the other side, might, therefore, have been spared, as wholly irrelevant; and if all that has been said about the *expediency* of the acts, and the odious nature of *monopolies*, be taken away, the specious body of their argument will be reduced to a mere skeleton, without flesh or muscle. These laws, after being enacted by the different branches of the legislature, have passed five different councils of revision, composed of the collected wisdom of the state, and when the eyes both of the legislature and the council were open to the constitutional objections which have been mentioned. If it were proper to cite such authority here, it might be said, that there had been five adjudications, by five successive sets of judges, on the very question now before the court.

These laws must be considered, *prima facie*, valid, and their invalidity must be clearly shown by the respondents.

Granting, however, to the respondents, the benefit of their propositions, the acts must be deemed valid so far as they do not interfere with patents for *inventions*, or the regulations of commerce. A statute may be good in part and void in part. It is void for the excess merely; and so far only as it must, of necessity, be void.

1. These laws do not infringe the power of congress to grant patents for inventions. Congress can only *secure*, not create

a benefit, and this security or exclusive right can be given only to *authors* and *inventors*. Congress can only legislate as to inventions; and this state may legislate on subjects, concerning which congress cannot legislate.

Because the appellants have not called their steam-boat an invention, the respondents have assumed that it was none, and have endeavored to strip the appellants of all merit or claim to legislative patronage. But the appellants, if they are not inventors, have, at least, the merit of introducing a very valuable improvement *from *Europe*. Every civilized nation protects imported improvements. What would *Great Britain* have been, had she not wisely availed herself of the discoveries and improvements of other countries? By nature, less fertile than the islands of the *Mediterranean*, she has by the aid of foreign genius, by securing an exclusive right to imported improvements, fertilized her soil, extended the arts, enlarged commerce, and amassed wealth and power above all the isles of the ocean, and which have enabled her to contend with the greatest nations of the earth. Can this country expect to take its eagle flight, and to reach its high destinies, by the strength of its own genius alone, without the aid of foreign invention? If the states cannot protect and reward imported improvements, congress certainly cannot. It can only patronise inventions. But this power exists in every sovereignty. It must exist in the states. It is an attribute of sovereignty retained by them, that they might promote the welfare and happiness of the people, by conferring rewards on the authors of useful discoveries, and encouraging foreign genius to become domiciliated in the land.

Monopoly is a technical term. It is a *prerogative* grant, in hostility to the public good. Who ever heard of a monopoly erected by act of parliament? This legislative grant was intended to compensate genius for introducing, extending, and perfecting, the invention of others. A public benefit was contemplated; not from the pride of invention, but from the enjoyment of the machine.

Though the appellants do not claim as inventors, yet we contend that even a patent from congress to the respondents would not defeat this legislative grant.

The power to promote science and the useful arts, by granting patents to the inventors, is a concurrent power. Instead of having to contend with the opinion of the able writer of the "*Federalist*," who has been so warmly and justly eulogised by my learned friends, I hope to secure him on the side of the appellants, and avail myself of his authority to show that some of the powers granted to congress are concurrent. He regards all powers not *exclusively* delegated to the *United States*, as retained by the states. This exclusive alienation of state sovereignty by the states, he considers as existing in three cases: 1 Where the constitution has, in *express* terms, granted an exclusive authority to the union; 2. Where it is granted to the union, and the states are expressly *prohibited from exercising

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the like authority ; and, 3. Where an authority is granted to the *United States*, to which a similar authority in the states would be absolutely and totally contradictory and repugnant. The third class of cases appears wholly unnecessary, and ought to be rejected. He admits that "it is not a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existent right of sovereignty." This opinion, on the subject of a concurrence of powers, is explicitly stated at the conclusion of the thirty-second number. That "the necessity of a concurrent jurisdiction, in certain cases, results from the division of the sovereign power : and the rule that all authorities, of which the states are not explicitly divested in favor of the union, remain with them in full vigor, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument." For "notwithstanding the affirmative grants of general authorities, there has been the most pointed care, in those cases where it was deemed improper that the like authorities should reside in the states, to insert negative clauses prohibiting the exercise of them by the states."

Is this case, then, any thing more than an accidental or occasional interference in the policy of a branch of the administration of the union? Is it a case which necessarily implies an absolute contradiction and repugnancy to the power given to congress?

The power to lay and collect taxes, duties, imposts and excises, is stated by the author of the *Federalist* to be a concurrent power, except as to what is expressly prohibited, in the next section, to the several states. Would it be unconstitutional in the state of *New-York* to pay a portion of the debt of the *United States*, or for congress to receive such a payment?

As to providing for the common defence, can this state erect a fort or bulwark for its defence, without benefiting a neighboring state, or the *United States*?

A state could not have a power to borrow money on the credit of the *United States*; and that is a power necessarily exclusive.

But is the power to regulate commerce with the *Indian* tribes exclusive? The legislature of this state have passed acts on that subject, regulating commerce with them.

The power to regulate commerce with foreign nations, and among the several states, is restricted by the prohibition to the states to make any treaties, alliance, or confederation, or to enter *into any compact or agreement with another state or foreign power.

The states are expressly prohibited from *coining money*, and of course, from regulating its value; but have they not a concurrent power to regulate the value of *foreign* coin? But congress have acted on the subject. Is not the standard of weights and measures regulated by a law of this state?

The establishment of post-offices and post-roads is also concurrent. For if congress had neglected to establish them, might not this state have provided for the enjoyment of so great a public convenience by its citizens?

The power to establish a judiciary could not have been before possessed by the states, and is, therefore, necessarily exclusive.

The power to define and punish piracies and felonies committed on the high seas, was not vested, in right of sovereignty, in the states, but had always been exercised by congress.

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water, are powers expressly denied to the states.

Though congress have power to raise armies, provide and maintain a navy, and make rules for the regulation of the land and naval forces, may not the executive of this state call out the militia to support the laws, suppress insurrection, or repel invasion? Is the state government palsied, and incapable of self defence, because congress has the supreme legislative power? Has not the state a right to regulate the conduct of the militia or troops of the *United States*, while within its jurisdiction, though it cannot order or direct them as to their service?

The only section in which the term *exclusive* is used, is that which gives to congress the "exercise of exclusive legislation, in all cases," over a district of ten miles square, and over places purchased by consent of the states, for the erection of forts, &c.

It has been inferred from the language used in the *Federalist*, (No. forty-three,) in speaking of the power to promote the progress of science and useful arts, by "securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries," that "the states cannot *effectually* make provision for either of the cases," that the author considered the power exclusive. But that is clearly not a reason for taking away the power from the states. They may make the best provision in *their* power; and congress may make still more efficacious laws on the subject.

Again, it is said that the state power has been absorbed by the *plenary exercise* of the power of congress. Absorption is always in proportion to the absorbing power. If half is absorbed, the other half remains. But this is not the language of the constitution, which is plain and simple; and the rights of the states are not to be explained away by metaphors and figures of speech.

To exclude the exercise of power by the states, there must be a complete, entire and exclusive legislation on the subject by congress. If there is an implied exclusion arising from any constitutional incompatibility in the exercise of the powers of the two governments, it must be as old as the constitution itself. It must be a plenary power which has existed, *ab initio*, so that from that moment the power of the states was extinct.

The result of the argument of the respondents is, that there can be no concurrent power where the exercise of the power by

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congress would exhaust the subject. To this we agree, with the addition of its being a plenary exercise of power ; for nothing but an entire, *plenary*, and exclusive exercise of the power can exhaust the subject.

The federal constitution was adopted by this state in 1788, yet we find, on the 26th *February*, 1789, a few weeks before the meeting of the first congress under that constitution, the legislature passed a law for "securing to *James Rumsey* the sole right and advantage of making and employing, for a limited time, the several mechanical improvements by him lately invented." (2 *Greenleaf's* edit. of *Laws*, p. 271.) This law was passed after the powers in relation to the subject were absolutely transferred by the constitution, according to the construction given by the respondents' counsel, to congress. Yet that law was passed by men perfectly conversant with the federal constitution. *Rumsey* was a *Virginian*, and he obtained a similar patent from almost every state in the union, which shows that the states understood that they still retained, notwithstanding the new constitution, a power of legislation on the subject. These laws furnish a cotemporary and authoritative exposition of the constitution, and vindicate the power of the states even as to *mechanical inventions*.

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In the year 1789, certain amendments to the constitution were proposed ; and of the articles adopted, the ninth and tenth were, "that the enumeration in the constitution of certain rights, shall *not be construed to deny or disparage others retained by the people." That "the powers not delegated to the *United States* by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The convention of this state adopted the constitution with the explanation given by General *Hamilton*, who was a member, that no powers were conferred on congress but such as were explicitly given by the constitution.

The sixth article of the constitution is the master-key to what is meant by concurrent power. It declares that "the constitution and the laws of the *United States* which shall be made in pursuance thereof, and all treaties which shall be made under the authority of the *United States*, shall be the supreme law of the land ; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state notwithstanding." When, then, will the supposed collision or interference between the laws of congress and of the states arise ? Whenever congress exhausts the subject by a plenary exercise of its legislative power, then the laws of the states must interfere with the law of congress. In no other respect is congress supreme. Its supremacy is coextensive with its legislation.

The act of congress of the 14th of *April*, 1802, relative to *naturalization*, (7 *Cong. sess.* 1. c. 28,) does exhaust the subject. It declares "that any alien, being a free white person, may be admitted to become a citizen of the *United States*, or any of them, on the following conditions, and not otherwise."

Until this plenary exercise of the power by congress, the power of the states was concurrent. This act of congress admits that a concurrent power did exist in the states ; else, the terms "not otherwise" were useless ; but they were inserted to take away the exercise of a concurrent power on the subject. In *Collett v. Collett*, decided in 1792, the Circuit Court of the *United States*, consisting of Justices *Wilson*, *Blair* and *Peters*, were of opinion that the states did enjoy concurrent authority on the subject ; but that their individual authority could not be exercised, so as to contravene the rule established by the authority of the union. The term *uniform*, as applied in regard to the rule of naturalization, has the same meaning as when used in the first paragraph of the eighth section, in regard to duties, imposts and excises. It relates to the mode or manner of exercising the power by congress ; not that the states should not lay any such taxes. It means only that the law *should be *uniform* in all the states ; so that a person should not, by two years' residence in *Virginia*, five years' residence in *New-Jersey*, and three years in *New-York*, be entitled to be admitted as citizens. If the argument of the respondents is sound, then the states, after the adoption of the constitution of the *United States*, had no right to naturalize aliens. Yet we find that the legislature of this state, by an act passed the 28th of *February*, 1789, (2 *Greenleaf's* edit. of *Laws*, p. 279,) did naturalize, by name, above one hundred persons, many of whom rank among our most respectable citizens. In the case of *The United States v. Villato*, (2 *Dallas' Rep.* 371,) Judge *Iredell*, though he intimated an opinion that the power of naturalization operated exclusively as soon as it was exercised by congress, did not think it necessary to decide that point, and the cause was determined on a different ground.

It has been said that the law of congress relative to patents shows that the laws of the states were regarded as incompatible, since it requires persons to surrender up the rights derived from the states, before they can obtain patents from the *United States*. It was not until 1793 that this clause was introduced. It is not to be found in the act of 1790.

All the states had granted exclusive rights before the act of 1793. To repeal or destroy those grants would have been a breach of good faith ; an act of turpitude. Congress holds out inducement by superior privileges, to the patentees under the states to surrender their rights, and thereby exonerate the states from their grants.

Congress gives the exclusive right for fourteen years ; it might have been for one year only. Is that a plenary exercise of the legislative power on the subject ? There is no prohibitory clause, as in the naturalization law of 1802. May not the states, after the expiration of the fourteen years, give to the patentee an exclusive privilege within the state, for fourteen or twenty years more ? To take away the power of the state, congress must have exercised complete and entire legislation, by using words of exclusion. The grant of the state is good so far

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as the state has power, and is void only for the excess. There must be an actual interference between the two laws, to render that of the state void. It is not to be considered void, because some unborn regulation of congress may, by possibility, hereafter exist, with which it might interfere.

But though not stated in the bill, we assert that this mode of propelling a boat by steam is an *invention*, and even, as such, we contend that the appellants have a right to the enjoyment of it, under *the law of the state. Congress have not power to confer a boon or reward. Its power is merely to *secure* a right for a *limited time*. The merit or demerit of the subject is not examined. The act of congress makes only a general and indiscriminate regulation; it does not reward genius. It makes no distinction between the inventor of a steam engine and one who invents a smoke-jack. The state grants and *creates* an estate, and rewards the inventor. The patent merely *secures* the property to the inventor for a certain time. It proceeds as to authors, on the common law notion; as to inventors, on natural rights. In *England*, the exclusive privilege was enlarged to *Harris & Bolton*, by act of parliament. The patent law only makes the book or machine tangible property, by clothing the productions of the mind with the attributes of personal property. It puts the author or inventor in possession of the production of his mind, which, after being disclosed, would become the property of the public. It puts it on the footing of a *chattel*. It gives no remedy for obstructing the exercise of the right. This shows that it was meant to secure the mere property only; and leave it to the several states to regulate the enjoyment or use of it, in the same manner as every other right of property. A state may prohibit or take away the enjoyment of real or personal property, whenever it deems it necessary to the public good. The patent right is to be enjoyed fully and amply, so far as it does not contravene the laws of the several states. Suppose a patent should be granted under the *United States* to Mr. *Fulton*, for his *torpedoes*, a dreadful instrument of destruction, could not this state prohibit him from planting them in the harbor of *New-York*, to the danger of every vessel that might touch them? What, then, becomes of the doctrine, that patent inventions may force themselves into our fields and habitations, and stride over the land as a blessing or a pestilence, while the states must bow in homage, or reverential horror, to the potent and pestilential patent.

Admit that the states might combine by their laws against the patent invention. Can a state make no law for fear of such a possible combination? But every state may, in defence of the morals of its citizens, prevent the sale of splendid and seducing pictures, though they are patent property. *Georgia* permits the importation of slaves. But may not all the other states enter into a hallowed combination against this immoral and detestable commerce? Each state may regulate the introduction or use of property within *its jurisdiction, whether it

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be patent property or not. The constitution of the *United States* does not prevent this state from filling up the mouth of the *Hudson*, so as to prevent the navigation altogether. If such a thing should be done, however we might deplore the madness or folly of the measure, it would be an act of sovereignty to which all must submit. The only control or check to such an exercise of power must be the good sense of the legislature, the interests of the people, and the force of public opinion.

If the public good should require it, might not the legislature prohibit the navigation of the *Hudson* by vessels of a particular size or construction?

Suppose a bar in the river, over which vessels only of a certain tonnage could pass, and a person should invent a mode of removing the bar, could not the legislature reward the genius of the inventor, by requiring all vessels of a larger size to pay him a certain toll? Would not the legislature of *Pennsylvania* grant an exclusive privilege, as to navigating above the first falls of the *Delaware*, to the genius who should be able to remove that obstruction, and thereby confer so great and lasting a benefit on the state? Has not the *steam-boat* cleared the *Hudson* of the bar of ignorance and prejudice, and conferred an equal benefit on the public? The steam-boats do not hinder or prevent the ancient mode of navigating the *Hudson*. All vessels and boats with sails are as free to pass as before. All existing rights are left unimpaired.

How do these acts interfere with the regulation of foreign commerce? The boats do not transport merchandise; they carry passengers only. If they did, in part, interfere with the law of the *United States*, they would still be valid for the residue; for it is not denied, that where there is an actual collision with the law of congress, the state law must yield. But this interference must be pointed out.

If the power of congress to regulate foreign commerce is absolutely exclusive, so must be the power to regulate the trade with the *Indians*, and between the different states. The construction contended for by the respondents would break down our toll-gates and bridges, ruin our canals, destroy our ferries and every other arrangement for the accommodation of the public, and the convenience of social intercourse. In how many instances does our statute book exhibit regulations as to foreign commerce? From the 1st of *June* to the 1st of *November*, no foreign vessel *can come up to the custom-house, but must remain at *Staten Island*; and every vessel must pay a sum of money to the health-officer appointed by the state; masters of vessels must report their passengers, and give security to the mayor of *New-York* that they do not become chargeable as paupers. Slaves cannot be imported, though in some other states deemed articles of merchandise. Hides and other noxious articles cannot, at certain seasons of the year, be landed; and, in a thousand other instances, the legislature of this state have made regulations affecting foreign commerce. The prin-

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ciple of the respondents would carry havoc through your statute book. The *quarantine* laws and regulations of the state are recognised and enforced by an act of congress. (*Vol. 4. p. 259. 5 Cong. sess. 3. c. 118.*) All these state regulations are valid, subject, however, to yield to any express law of congress on the same points.

The constitution of the *United States*, by prohibiting the states from laying a duty on imports, admits the power of the states to regulate commerce. Acts of the state co-ordinate with those of the *United States* are good. If congress makes a particular port of entry, the state cannot prohibit the entry of vessels there. If congress should declare *Harlaem* to be a port of entry, what is to become of *Cole's Bridge* over that river? Should *Albany* be made a port of entry, cannot the state erect a bridge across the *Hudson* below that city? Every *toll-bridge* leading to other states, over which merchandise is carried, is a regulation affecting commerce. What is the *Cayuga ferry* but a commercial regulation, by which a transit duty is collected on the road to *Canada*? *Barton's Mills* and ferry, at *Niagara*, regulate the commerce with *Canada*. Yet the *United States* have submitted to all these regulations. The counsel for the respondents call these *municipal* regulations; but, under the name of a *municipal* regulation, can the state regulate foreign commerce? In *Perrin v. Sikes*, (*Day's Cases in Error*, 19,) a grant by the legislature of *Connecticut* of an exclusive privilege, with a penalty, to run stage wagons on the post road as far as the line of the state was held valid. The mail of the *United States*, and the troops of the *United States* passing toll-gates and bridges, are obliged to pay toll. The right to exact the toll in those cases has never been questioned by the *United States*. The best public works, and the most valuable stock in the states, would be annihilated by the argument of the respondents, under the idea of a possible interference with the power of congress to regulate commerce.

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*Congress has power to pass *uniform* laws on the subject of bankruptcy; but are the state insolvent laws, which are in substance bankrupt laws, unconstitutional? The word *uniform*, in the constitution, is not an enlarging, but a restrictive word.

Then as to the *remedy* by injunction. The act of the last session (*Sess. 34. c. 200*) is a legislative interpretation of the law, and expressly recognises the right of the appellants as well as the remedy. Why should the cause be sent to law to try the title, when that title is clear? Cases are sent to be tried at law to clear up a doubtful point. Is not this court competent, with the aid of the five judges, to decide every legal question? Issues at law are directed by chancery, to take the opinion of the law judges as to the validity of a grant, or to try a doubtful fact, by the intervention of a jury. In *prerogative* cases, the chancellor is bound by 21 *James I. c. 3. s. 3*, to send the case to law to be tried. Lord Coke (2 *Inst.* 182) says, that the act having declared all monopolies, &c. void, has provided that they shall be examined, heard, tried and determined at the

courts of common law, according to the common law, and not in the Council Chamber, &c. A court of chancery was expressly excluded, by that statute, from trying the validity of such grants.

Except in prerogative cases, there is no instance of a cause sent to be tried at law, without an antecedent injunction. In the case as to the prolongation of *Bolton's* patent, (3 *Ves.* 140,) by act of parliament, it was sent to be tried at law, with an injunction. The law judges of the Common Pleas differed as to the validity of the patent, and the chancellor continued the injunction until the right could be again tried at law.

In *Gurney v. Longman*, (18 *Ves.* 493,) the chancellor did not send the case to be tried at law, but decided upon it himself, and granted an injunction.

On prerogative questions, to this day, the case must be sent to law; but under the statute of *Anne*, and where the right is founded on the statute, there is not a case to be found where an injunction has been refused. It is surprising that the contrary should have been asserted by the learned counsel. In *Tonson v. Collins*, (4 *Burr.* 2327. 2353. 2383. 2400,) the question was on the broad common law right; the court, though in favor of the plaintiff, gave no opinion, as they suspected the action to be *collusive*, and being ascertained of the fact, refused to proceed in the cause. While the question was thus pending in the court of K. B. doubts arose in the Court of Chancery, and Lord *Northington*, in *Millar v. Donaldson*, and *Osborne v. *Donaldson*, refused an injunction, without any opinion being given; but the question did not arise under the statute of *Anne*. The case of *Gyles v. Wilcox and others* (2 *Atk.* 141) did not arise under the statute of *Anne*; and an injunction was not refused, but the reasons of the chancellor were in favor of it. The same case was again before the chancellor, (3 *Atk.* 269,) and he ordered the injunction to be continued.

The cases of *Carey v. Faden*, (5 *Ves.* 24,) *Hogg v. Kirby*, (8 *Ves.* 215,) and *King v. Reed*, (8 *Ves.* 223, in note,) were not within the statute of *Anne*. The rule stated by Lord *Mansfield*, in *Miller v. Taylor*, (4 *Burr.* 2400,) that a court of chancery will not grant injunctions, unless the legal property is made clear at law, has been very much qualified; (*Coop. Eq. Pl.* 155, 156;) and an injunction always precedes a reference or trial at law, to ascertain doubtful facts. As there is no *prerogative* right in this state, the rule must be to issue an injunction in the first instance. This court can pronounce on the validity of the law. Where is the room for doubt? If this court doubts now, when will it ever cease to doubt? Settle the law now, and then the injunction follows the title, unless the answer sets up disputed facts for a jury, and then the injunction must continue until a hearing. The acts are *prima facie* valid; and if there are doubts, an injunction ought to continue until those doubts are removed. Why should not a statute right receive the same protection as a common law right? In

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England, injunctions issue to protect statute rights. (2 *Atk.* 93.)

The rights of Mr. *Livingston* were valid before the statute was passed which gave the forfeiture. The penalty was a cumulative remedy. It did not take away or destroy the right and remedy which antecedently existed.

The rule that where a remedy is given by statute, it is exclusive of every other remedy, is applicable only to criminal cases. The rule was never applied to a *civil case*, before that of *Miller v. Taylor*, nor has it ever been so applied since. Baron *Eyre*, before the House of Lords, (4 *Burr.* 2409,) says expressly, that though an author is precluded by the statute from every remedy, except on the statute; yet there may be a remedy in equity upon the foundation of the statute, independent of the terms and conditions prescribed by the statute, in respect of the penalties thereby given. The rule is confined to *criminal cases*, and in them it applies only where the remedy is given in the same section which creates the offence. (*King v. Harris*, 4 *Term Rep.* 202. 205.) The case of *Almy v. Harris* (5 *Johns. Rep.* 544) was a *qui tam* action, under the peculiar words of the statute which gave the right to no one; and it was, essentially, a *criminal case*.

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Again, here was an executory contract, and the condition having been performed by the appellants, it would be an act of perfidy in the state not to perform the contract on their part. Such a breach of good faith would level genius, public honor and integrity in the dust.

YATES, J. This is an appeal from an order of the Court of Chancery, refusing to grant an injunction.

The appellants claim an exclusive right to navigate the waters of this state, by steam, for a limited time, grounded upon several statutes of this state, by which this right is granted, and intended to be protected and secured to them.

The respondents contend that the laws are void, as repugnant to the constitution and laws of the *United States*, and, therefore, give no right to the appellants upon which the relief, or injunction sought by their bill, could be founded. Two questions, consequently, arise.

1. As to the constitutionality of the laws:

2. Admitting their validity, whether the appellants are entitled to enjoin the respondents, according to the prayer of their bill, or to any other remedy than that prescribed by the legislature.

The importance of this decision must be evident to every one that hears me; no question has, perhaps, ever presented itself to this court of greater magnitude, involving principles so highly interesting to the community. In making up my opinion, therefore, I have endeavored to bestow the strictest attention, in order to bring my mind to a satisfactory and correct conclusion on the subject.

The first law, passed in *March*, 1798, recited, that whereas it had been suggested to the people of this state, represented

in senate and assembly, that *Robert R. Livingston* was the possessor of a mode of applying the steam engine, to propel a boat on new and advantageous principles, but that he was deterred from carrying the same into effect, by the existence of a law granting and securing to *John Fitch* the sole right of making and employing the steam-boat by him invented; that *Fitch* was either dead, or had withdrawn himself from the state, without having made any attempt, in the space of more than ten years, to execute the plan for which he obtained the exclusive privilege, whereby the same was justly forfeited. By this act privileges similar to those *before granted to *Fitch* were granted to Mr. *Livingston*, for twenty years, on his satisfying the governor, lieutenant-governor and the surveyor-general of this state, of his having built a boat, of at least twenty tons' capacity, which should be propelled by steam, and the mean of whose progress through the water, with and against the ordinary current of *Hudson* river, taken together, should not be less than four miles an hour; and that he should, at no time, omit, for the space of one year, to have a boat of such construction plying between the cities of *New-York* and *Albany*. The same privilege was granted, in *April*, 1803, to Messrs. *Livingston* and *Fulton*, the present appellants. In 1807, the act was extended for two years, within which time it was not contended but that the provisions in the first act were complied with, the boat being built, and the experiment proving successful. In *April*, 1808, an act passed for the further encouragement of steam-boats in the waters of this state, and for other purposes. This law enacted, that whenever *Robert R. Livingston* and *Robert Fulton*, and such persons as they might associate with them, should establish one or more steam-boats, or vessels other than that already established, they should, for each and every such additional boat, be entitled to five years prolongation of their grant or contract with this state; provided, nevertheless, that the whole term of their exclusive privileges should not exceed thirty years after the passing of that act; that no person or persons, without the license of the persons entitled to the exclusive right to navigate the waters of this state by boats moved by steam or fire, or those holding the major part of the interest of such privilege, should set in motion, or navigate upon the waters of this state, or within the jurisdiction thereof, any boat or vessel moved by steam or fire; and the person or persons, so navigating with boats or vessels moved by steam or fire, in contravention of the exclusive right of the appellants, and their associates and legal representatives, should forfeit *such boat or boats and vessels, together with the engines, tackle and apparel thereof, to the appellants and their associates.*

After the most minute examination of those statutes, I cannot find that Mr. *Livingston*, originally, nor Mr. *Fulton*, subsequently, pretended to be the inventors of their steam-boats; on the contrary, by the recital in the law of 1798, *Livingston* represents himself to be the possessor of a mode of applying

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the steam engine to propel a boat on new and advantageous principles.

This power of granting exclusive privileges, must necessarily *exist somewhere, as the legitimate source from whence the encouragement and extension of useful improvements is derived; and from its nature, it is generally exercised by the sovereign authority of every civilized country; and in no government can it be placed in safer hands to ensure those important advantages than in our own, where the sovereignty is in the representatives of the people. Before the adoption of the constitution of the *United States*, every state in the union, unquestionably, possessed the uncontrolled exercise of this power within its own territory, and most of them exercised it, as will appear on an examination of the laws passed by the legislatures of some of the states, several of which have been stated to this court. This, however, is so plain and evident a proposition, that a recurrence to those laws cannot be necessary to establish it.

The laws granting and securing this exclusive right, it is contended, are unconstitutional:

1. Because they interfere with the powers of congress to regulate patents.

2. Because they interfere with the regulation of commerce.

I do not think it necessary, on this occasion, to enter generally into the discussion of the powers granted to congress, and which are to be considered as exclusive, or which ought to be deemed concurrent. It cannot now be questioned, particularly since the amendments to the constitution of the *United States* were adopted, that according to the tenth article of those amendments, "the powers not delegated to the *United States* by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." By the eighth section of the constitution, among the powers granted to congress, it is stated, that they shall have power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." Thus it appears, in the exercise of this power, they are limited to authors and inventors only; this clause, therefore, never can admit of so extensive a construction, as to prohibit the respective states from exercising the power of securing to persons introducing useful inventions (without being the authors or inventors) the exclusive benefit of such inventions, for a limited time; a power no less instrumental in promoting the progress of science and the useful arts, and, consequently, equally essential to the prosperity of the country. The beneficial effects experienced by other countries, *particularly *England*, sufficiently show the policy and propriety of passing laws for the encouragement of imported inventions. This power, then, evidently necessary and useful, is not granted to congress by the clause as to authors and inventors, and as it is not taken away by any other part of the constitution, it must, of course, be retained by

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the respective states, to be exercised by them, until it interferes with the laws of the *United States*, passed to secure the author or inventor. It is not probable that such collision will take place. Whenever it does occur, it remains exclusively with the courts of the *United States* to interpose; and no doubt can be entertained, but that the person claiming a right by patent, as inventor, would prevail, and the state law would give way to the superior power of congress.

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The laws granting this exclusive privilege to the appellants cannot interfere with the regulation of commerce. It never could have been intended that the navigable waters within the territory of the respective states, should not be subject to their municipal regulations. Such a construction might, with equal propriety, be applied to turnpike roads, ferries, bridges and various other local objects, and thus, in the vortex of this construction, almost all subjects of legislation would be swallowed up, and it might, eventually, lead to the total prostration of internal improvements.

To all municipal regulations, therefore, in relation to the navigable waters of the state, according to the true construction of the constitution, to which the citizens of this state are subject, the citizens of other states, when within the state territory, are equally subjected; and until a discrimination is made, no constitutional barrier does exist. The constitution of the *United States* intends that the same immunities and privileges shall be extended to all the citizens equally, for the wise purpose of preventing local jealousies, which discriminations (always deemed odious) might otherwise produce. As this constitution, then, according to my view, does not prevent the operation of those laws granting this exclusive privilege to the appellants, they are entitled to the full benefit of them.

By the law of 1808, the boats, together with the engine, tackle and apparel thereof, are forfeited to the appellants; and a question is raised here, whether they are entitled to any other remedy than that prescribed by the legislature.

This right being claimed under an express grant by the statute, creating the forfeiture, and no doubt remaining of the existence of *the boats, the presumption was irresistible that they navigated contrary to the statute, and that the property was in the appellants. The injunction, therefore, on those grounds, might well have been ordered. I cannot discover what injury could arise, by preventing such acts as might create the forfeiture afterwards; it could only operate as a prohibition to navigating contrary to the statute.

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Most of the cases cited by the respondents, where injunctions had been refused, in the first instance, are cases of *prerogative*, or where the right was doubtful, and the granting of the injunction might create irreparable mischief. I do not think they can apply to this case.

In the case of *Gyles v. Wilcox and others*, (2 *Atk.* 141,) a bill was brought for an injunction to stay the printing of a book, and the question was, whether it had been borrowed

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from another book, contrary to the statute of *Anne*, also creating a forfeiture. Lord *Hardwicke* said it was not a case proper for law, as it would be absurd for a judge to sit and hear both books read over, which was necessary, where one is only a copy; and that the court was not under an indispensable obligation to send all facts to a jury, and continued the injunction, until arbitrators had awarded as to the fact. If this be so, might not the propriety of refusing this injunction to try a fact at law of such public notoriety, as to their navigating or not, be questioned? There is scarcely a citizen not conversant of the fact. And ought this injury, then, to be permitted, in the present case, by an inflexible adherence to what was not deemed indispensable in the case just cited? I should think not.

In the case of *Blackwell v. Harper*, (2 *Atk.* 92,) the remedy was by injunction; and where the right is matter of record, injunctions are granted. (1 *Ves.* 476.) So in 3 *Ves.* 140, an injunction was granted, that the validity of a patent might be tried at law; and in *Harmer v. Plane*, (14 *Ves.* 130,) an injunction was granted where the right was doubtful, the party being in possession. The cases in 6 *Ves.* 707, and in 1 *Bro.* 451, are to the same point.

From these and numerous other cases, no doubt can exist that the injunction, in this instance, ought to have issued. My opinion, therefore, is, that the order of his honor the chancellor ought to be reversed, and that the cause should be sent back with directions to enjoin the respondents.

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*VAN NESS, J. was of the same opinion, and gave his reasons.

SPENCER, J. being related to some of the parties concerned, declined giving any opinion.

THOMPSON, J. In examining the questions which have been presented in this case, I shall pursue the order adopted on the argument; by first inquiring into the right claimed by the appellants; and secondly, whether, if the right be established in them, they are entitled to an injunction to restrain the respondents from an infringement of that right.

In considering the first branch of this subject, I deem it unnecessary to go into a particular inquiry as to the constitutional power and authority of the legislature to grant exclusive privileges upon the *navigable waters* within this state. All objections heretofore raised against the laws in question on this ground, have been, in a great measure, abandoned by the respondents' counsel. I would observe, however, generally, that viewing this state as an independent sovereignty, not having surrendered any of its constitutional powers to the government of the *United States*, I am at a loss to discover any reasons why this power should be denied to the legislature. There is certainly no express prohibition in our constitution; nor do I see any reasons, growing out of the nature and principles of our government, for denying to it this act of sovereignty. It appears to me a necessary and indispensable power, which, under a wise and discreet exercise of it, will be produc-

tive of very beneficial effects. The power of granting exclusive privileges upon land, has not been, in the least degree, questioned; and the same reasons, both of principle and policy, will allow to the government the exercise of analogous powers upon the waters within the jurisdiction of the state. No distinction appears to have been recognised in the practice of our government. Grants of land under the water, the exclusive right of ferriage, and the regulation of the fisheries in the *Hudson* river, as well as canals, turnpike roads, and exclusive privileges of running stage-wagons, have all been occasionally subjects of legislative bounty and provision.

All the arguments which have been urged against the policy or expediency of granting exclusive privileges in general, or the particular privilege which forms the present subject of inquiry, *have been addressed to the wrong forum. They are arguments for legislative, not for judicial consideration. We are called upon to pronounce what the law is, not what it ought to be. In a legislative capacity, considerations of policy and expediency are entitled to their due weight, to convince the judgment or guide the discretion. But in a judicial capacity, no such latitudinarian power is given; we are under the solemnity of an oath to decide the rights and claims of parties, according to existing law. Unless, therefore, we are prepared to pronounce the appellants' claim, as set up, to be absolutely void, their right must be considered fixed and established.

I shall not stop to examine whether it be competent for the courts of justice in this state, to disregard acts of the legislature, and declare them unconstitutional and void. The counsel for the appellants have not put their cause upon that ground. But admitting such a power in the judiciary, it ought to be exercised with great caution and circumspection, and in extreme cases only. It certainly affords a strong and powerful argument in favor of the constitutionality of a law, that it has passed not only that branch of the legislature which constitutes the greater portion of our court of *dernier resort*, but also the Council of Revision, which is composed of the governor and the two highest judicial tribunals of the state, (next to this court,) and whose peculiar province it is to examine and make all constitutional objections to bills, before they become laws. If this affords ground of argument in favor of a single law, which might have passed hastily and without due consideration, how strong and cogent is it in favor of a series of laws, on the same subject, from time to time, enlarging and strengthening the same right or claim; and more especially, as one of those laws has been passed since the present controversy has arisen, and after the attention of the several branches of the legislature must have been called to the objections now raised against them. With such a weight of *prima facie* evidence in favor of the constitutionality of these laws, I should not have boldness enough to pronounce them void, without the most clear, satisfactory and unanswerable reasons. I shall proceed,

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however, to examine the force of the objections which have been raised against the constitutionality of the laws, giving to the appellants the exclusive right to navigate the waters of the state by steam, uninfluenced by any presumption in favor of their validity.

These objections grow out of that part of the constitution of *the *United States* which gives to congress, 1st. The power to promote the progress of science and useful arts, by securing, for limited times, to authors and *inventors*, the exclusive right to their respective writings and discoveries; and, 2dly. The power to regulate commerce with foreign nations, and among the several states, and with the *Indian* tribes. (Art. 1. s. 8.) It is an undeniable rule of construction, applicable to the constitution of the *United States*, that all powers and rights of sovereignty, possessed and enjoyed by the several states, as independent governments, before the adoption of the constitution, and which are not either expressly, or by necessary implication, delegated to the general government, are retained by the states. This has been the uniform understanding of the ablest jurists, ever since the formation of that government; and it is a rule indispensably necessary, in order to preserve harmony in the administration of the different governments, and prevent that collision which a partial consolidation is peculiarly calculated to produce. This was the object contemplated and intended to be secured by the tenth article of the amendments of the constitution, which declares, that the powers not delegated to the *United States* by the constitution, nor prohibited by it, to the states, are reserved to the states respectively, or to the people. If, then, the grant of the right or privilege claimed by the appellants, would, before the adoption of the constitution, have been a legitimate exercise of state sovereignty, it would, I think, under the rule of construction which I have suggested, be a strained interpretation of that instrument, to say such sovereignty has been thereby surrendered by the state. This power is certainly not denied to the states, nor exclusively granted to the union, by *express terms*: and those powers which are exclusive, by necessary implication, must be such as are created by the constitution, and which did not antecedently form a part of state sovereignty, or the objects of which, from their nature, are beyond the reach and control of the state governments. An express prohibition to the states, against the exercise of powers of that description, would have been useless and absurd. I might go through the various powers given to congress, and illustrate the truth of the position I have laid down, but shall refer only to one or two. Congress have power to *borrow money on the credit of the United States*. This is an exclusive power by necessary implication. It is a power created by the constitution. No prohibition to the states was necessary, and indeed would have been absurd; because *this never was, before the adoption of the constitution, within the scope of state power: no state being able to pledge the credit of the *United States* for the repayment of the money

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borrowed. The power to constitute tribunals, inferior to the Supreme Court, falls under the same class.

But it is obvious that the mere grant of a power to congress does not necessarily vest it exclusively in that body. Congress has power to lay and collect taxes. But this does not preclude the states from the exercise of a like power, except so far as they are expressly restrained, in relation to duties on imports and exports. Thus we see that there are subjects upon which the *United States* and the individual states must, of necessity, have *concurrent* jurisdiction; and all the fears and apprehensions of collision in the exercise of these powers, which have been urged in argument are unfounded. The constitution has guarded against such an event, by providing that the laws of the *United States* shall be the supreme law of the land, any thing in the constitution of any state to the contrary notwithstanding. In case of collision, therefore, the state laws must yield to the superior authority of the *United States*.

The power given to congress to promote the progress of science and useful arts is restricted to the rights of *authors* and *inventors*, and their rights are only to be secured for a limited time. Whatever power the states had over these subjects prior to the adoption of the constitution, and which have not been granted to the general government, and which are not within the scope and purview of its authority, must, beyond all possible doubt, be retained by the states. The appellants do not, in the case before us, claim as *inventors*, but only as *possessors* of a mode of applying the steam-engine to propel boats on new and advantageous principles. The right, therefore, claimed by them, as granted by the laws of this state, was beyond the reach of congressional authority; and the idea ought not for a moment to be indulged that, even admitting this to be a foreign and imported improvement, it is not worthy of legislative patronage and protection. The power given to congress on this subject was intended for the benefit of authors and inventors, and to secure their rights throughout the *United States*. The state government could only give this security within its own jurisdiction. It was, therefore, a wise and useful provision in the constitution, calculated to encourage the arts and sciences, which ought to be a favorite object *with every enlightened government. But because the states have delegated to congress this power, in a limited degree, shall it be denied to them to lend their aid in protecting and patronising useful improvements in any way they may think proper, not repugnant to the right secured under the authority of congress? Such a doctrine appears to me degrading to state sovereignty, and unnecessarily relinquishing a power not contemplated by the constitution. For the purpose of the present suit, the appellants are to be considered as the *possessors* only of the invention, and in that point of view I cannot discover the remotest doubt as to the constitutionality

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of the laws, the subject matter of them not being within the purview of any power given to congress.

But if the appellants are considered the *inventors*, and entitled to a patent, or as having actually obtained one, it cannot operate as an exclusion of all legislative authority and interference, to aid and protect the rights thus obtained under the general government. If the subject matter be within the scope of state jurisdiction, and the power is exercised in harmony with, and in subordination to, the superior power of congress, it is, beyond all doubt, legitimately exercised. If any person should appear claiming under a patent, in hostility to the privilege granted by this state, that would be a paramount right, and must prevail, if set up in a court having jurisdiction of the question; though it may well be doubted, whether even a patent could be set up, in the courts of this state, against these laws, as that might involve questions arising under the laws of the *United States*, which belong exclusively to the courts of the *United States*. (7 *Johns. Rep.* 144.) It was admitted by the respondents' counsel, that, had not congress begun to exercise the power given by this clause in the constitution, the subject matter would have been within the scope of state jurisdiction. Why this should make any difference, I am unable to conceive, as long as the power exercised by the state is not repugnant to, or incompatible with, that exercised by congress. That the mere grant of a power to congress does not necessarily imply an exclusion of state jurisdiction, has been the practical construction of the constitution in a variety of cases. As, for instance, congress have the power to provide for the punishment of counterfeiting the current coin of the *United States*; yet the legislature of this state has provided for the punishment of the same offence; and numerous other instances might be mentioned, if necessary. The only restriction upon the state government, in the *exercise of all concurrent powers is, that the state must act in subordination to the general government. It is not a sufficient reason for denying to the states the exercise of a power, that it *may* possibly interfere with the acts of the general government. It will be time enough to surrender the power when such interference shall arise. The framers of the constitution foresaw the possibility of such a state of things, and wisely provided the remedy, by making the laws of the *United States* the supreme law of the land. Thus guarded, there can no possible inconvenience result from the two governments exercising legislative authority over the same subject. But for the purpose of deciding the present question, it is unnecessary to go thus far, because the laws in question extend protection to the appellants as *possessors* only of the improvement, and this not being a subject within the authority of congress, there cannot arise any interference or collision of power.

The objection to the laws under consideration, on the ground that they interfere with the power given to congress,

"to regulate commerce with foreign nations, and among the several states, and with the *Indian* tribes," is less colorable than the former; for admitting the power here granted to belong exclusively to the general government, it does not, in any manner whatever, interfere with these laws, or extend to the rights and privileges which they are intended to secure. They neither concern foreign commerce, nor commerce among the several states, nor with the *Indian* tribes, but only give to the appellants the exclusive privilege of navigating all waters, *within* the jurisdiction of this state, by every species of boat or water-craft, which might be impelled by force of fire or steam. If this can, in any sense, be considered a regulation of commerce, it is the internal commerce of the state, over which congress has no power; and if the right to regulate internal commerce, or the intercourse between different parts of the state, ever belonged to the state government, it is still retained; for it never has been, either expressly or impliedly, yielded to the general government. To deny to the legislature this right, would be at once striking from our statute-book grants, almost innumerable, of a similar nature; all our turn-pike roads, toll-bridges, canals, ferries, and the like, more or less concern commerce, or the intercourse between different parts of the state, and must depend on the same principles with the privileges granted to the appellants. The truth, however, is, that none of them relate to commerce within the sense and meaning of the term as used in the constitution; *they are mere municipal regulations, with which congress have no concern. It can answer no valuable end, to enter into any speculative inquiry as to what would be the effect upon the appellants' rights under these laws, should congress, in regulating commerce, interfere with them. No such interference has as yet arisen, and it will be time enough to consider that question when it does arise. The general and conclusive answer, however, to all such supposed collisions of power, is what has already been mentioned, that the laws of congress are paramount, and must prevail.

I have thus noticed the principal arguments which have been urged against the constitutionality of the laws under which the appellants set up their claim, and I am satisfied that the objections are untenable; and unless these laws are absolutely void, the right of the appellants is clearly established.

The only remaining inquiry, is, whether they are entitled to an injunction, to restrain the respondents from an infringement of that right; and this, it appears to me, must follow as a matter of course. It has been contended that an injunction ought not to issue until the appellants' right has been first settled at law. This is, by no means, the universal, or even the common rule of practice on the subject. Where the right is doubtful, and that doubt can only be removed by a trial at law, there is some plausibility in requiring a party to establish his right before an injunction is granted. But this is not always the course, even in doubtful cases. There are many

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instances in the books, where the courts have said that possession, under color of title, is enough to enjoin and continue the injunction, until it is proved, at law, that it is only color, and not real title. The case of *Boulton v. Bull* (3 *Ves.* jun. 140) is one of that description. An injunction had been granted that the question as to the validity of a patent, might be tried in an action at law; and so doubtful was the right of the patentee, that the court, upon a case stated, were equally divided. Yet the lord chancellor refused to dissolve the injunction, declaring that he would not put the party to accept a *compensation*. So, also, in the case of *The Universities of Oxford and Cambridge v. Richardson*, (6 *Ves.* jun. 707,) Lord *Eldon*, in noticing what fell from Lord *Mansfield*, in *Miller v. Taylor*, "that it was a universal rule, that if the title is not clear at law, the court will not sustain an injunction," said, that he could not accede to that proposition, so unqualified, for that there had been many instances, within his own *memory, in which an injunction had been granted, and continued under such circumstances, until the hearing. The same doctrine is laid down in the case of *Harmer v. Plane*. (14 *Ves.* jun. 132.) And the lord chancellor said, there would be less inconvenience in granting the injunction, until the legal question could be tried, than in dissolving it at the hazard that the grant of the crown may, in the result, prove to have been valid. That the question was not really between the parties upon the record; for unless the injunction is granted; any person might violate the patent, and the consequence would be, that the patentee must be ruined by litigation. This last observation is entitled to great weight and consideration, and furnishes a strong and cogent reason for granting injunctions in cases of this kind. The prevention of a multiplicity of suits is one of the most salutary powers of a court of equity. These cases are sufficient to show that it is the prevailing practice in *England*, even where the right is doubtful, and the case is sent to be tried at law, to send it *with* an injunction, instead of denying it on that ground. But where the right is *clear*, an injunction is never refused; as when the right claimed appears on record, or is founded on an act of parliament, it is matter of course to grant an injunction, without first obliging the party to establish his case at law. (*Cooper's Eq. Pl.* 157. *Mitford*, 129. 1 *Ves.* 476.)

In the case of *Blanchard v. Hill*, (2 *Atk.* 485,) Lord *Hardwicke* said, that in cases of monopolies, the rule that the court had governed itself by was, whether there was any *act of parliament* under which the restriction was founded. But the court will never establish a right of this kind, claimed under a *charter only from the crown*, unless there has been an action to try the right at law. This will be found, on examination, to be a governing distinction, running through the numerous cases cited on the argument. And whenever an injunction has been refused, the right was claimed under a patent from the crown, and that right considered doubtful.

Applying these principles to the case before us, there is no possible ground upon which the injunction can be denied. The claim of the appellants is founded on acts of the legislature, and if those acts are considered valid, no doubt can exist as to the right. And if any doubt should be thought to exist on that point, yet, according to the established rule in *England*, this is not sufficient to warrant a denial of the injunction. If it be necessary to send the cause to be tried at law, it ought to be sent *with* an injunction.

*But where can be the necessity or propriety of sending the appellants into a court of law to establish their right? There are no facts in dispute upon which it is requisite for a jury to decide. The right must depend upon the validity of the statutes under which it is claimed. And that question, according to the course of our courts, may be brought back again to this tribunal for ultimate decision. But it is said the right claimed by the appellants, being created by statute, they are entitled to no other remedy than that which the statute gives.

Without examining whether the rule of law upon which this objection is founded is not confined to criminal cases altogether, it certainly cannot be applied to the present case; for the forfeiture is not given by the same statute which created and gave the right, nor until the right was actually vested in the appellants, by a fulfilment of the terms and conditions upon which they were to be entitled to the exclusive privilege now claimed by them; and if the right was vested, all existing remedies to enforce it were also vested, and are not to be taken away by implication. The act of *April*, 1808, creating the forfeiture, purports to be an act for the *further* encouragement of the appellants' steam-boats, which plainly shows that the remedies therein provided were intended as *cumulative*, and in addition to those already existing. This would be the construction in criminal cases, even where the offence is created and the penalty given by the same statute, provided they are in separate clauses. In the case of *The King v. Harris*, (4 *Term Rep.* 205,) *Ashhurst J.* says, it is a clear and established principle, that where a new offence is created by an act of parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause on the ground of its being a misdemeanor.

I think it unnecessary to pursue the question as to the remedy any farther, or to notice all the cases cited on the argument. I have looked into most of them, and am fully satisfied that if the appellants have the right claimed, the remedy cannot be denied to them. I the more readily abstain from taking up any more time in this examination, because I understood the respondents' counsel as, in a great measure, abandoning all opposition to an injunction, if the right was determined against them. Upon the whole, from a very attentive examination of the case, I entertain *a clear and decided opinion

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in favor of the validity of the appellants' right, as granted by the acts of the legislature, and that they are entitled to the remedy asked for to protect and secure them in the enjoyment of it.

I am accordingly of opinion, that the decree of the Court of Chancery ought to be reversed.

KENT, Ch. J. The great point in this cause is, whether the several acts of the legislature which have been passed in favor of the appellants, are to be regarded as constitutional and binding.

This house, sitting in its judicial capacity as a court, has nothing to do with the policy or expediency of these laws. The only question here is, whether the legislature had authority to pass them. If we can satisfy ourselves upon this point, or, rather, unless we are fully persuaded that they are void, we are bound to obey them, and give them the requisite effect.

In the first place, the presumption must be admitted to be extremely strong in favor of their validity. There is no very obvious constitutional objection, or it would not so repeatedly have escaped the notice of the several branches of the government, when these acts were under consideration. There are, in the whole, five different statutes, passed in the years 1798, 1803, 1807, 1808 and 1811, all relating to one subject, and all granting or confirming to the appellants, or one of them, the exclusive privilege of using steam-boats upon the navigable waters of this state. The last act was passed after the right of the appellants was drawn into question, and made known to the legislature, and that act was, therefore, equivalent to a declaratory opinion of high authority, that the former laws were valid and constitutional. The act in the year 1798 was peculiarly calculated to awaken attention, as it was the first act that was passed upon the subject, after the adoption of the federal constitution, and it would naturally lead to a consideration of the power of the state to make such a grant. That act was, therefore, a legislative exposition given to the powers of the state governments, and there were circumstances existing at the time, which gave that exposition singular weight and importance. It was a new and original grant to one of the appellants, encouraging him, by the pledge of an exclusive privilege for twenty years, to engage, according to the language of the preamble to the statute, in the "uncertainty and hazard of a very expensive experiment." The legislature must

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*have been clearly satisfied of their competency to make this pledge, or they acted with deception and injustice towards the individual on whose account it was made. There were members in that legislature, as well as in all the other departments of the government, who had been deeply concerned in the study of the constitution of the *United States*, and who were masters of all the critical discussions which had attended the interesting progress of its adoption. Several of them had been members of the state convention, and this was particularly the

case with the exalted character, who at that time was chief magistrate of this state, (Mr. Jay,) and who was distinguished, as well in the *council of revision*, as elsewhere, for the scrupulous care and profound attention with which he examined every question of a constitutional nature.

After such a series of statutes, for the last fourteen years, and passed under such circumstances, it ought not to be any light or trivial difficulty that should induce us to set them aside. Unless the court should be able to vindicate itself by the soundest and most demonstrable argument, a decree prostrating all these laws would weaken, as I should apprehend, the authority and sanction of law in general, and impair, in some degree, the public confidence, either in the intelligence or integrity of the government.

But we are not to rest upon presumption alone; we must bring these laws to the test of a severer scrutiny.

If they are void, it must be because the people of this state have alienated to the government of the *United States* their whole original power over the subject matter of the grant. No one can entertain a doubt of a competent power existing in the legislature, prior to the adoption of the federal constitution. The capacity to grant separate and exclusive privileges appertains to every sovereign authority. It is a necessary attribute of every independent government. All our bank charters, turnpike, canal and bridge companies, ferries, markets, &c. are grants of exclusive privileges for beneficial public purposes. These grants may possibly be inexpedient or unwise, but that has nothing to do with the question of constitutional right. The legislative power, in a single, independent government, extends to every proper object of power, and is limited only by its own constitutional provisions, or by the fundamental principles of all government, and the unalienable rights of mankind. In the present case, the grant to the appellants took away no vested right. It interfered with no man's property. It left every citizen to enjoy all the rights of navigation, and all the use of the waters of this state which he before enjoyed. There was, then, no injustice, no violation of first principles, in a grant to the appellants, for a limited time, of the exclusive benefit of their own hazardous and expensive experiments. The first impression upon every unprejudiced mind would be, that there was justice and policy in the grant. Clearly, then, it is valid, unless the power to make it be taken away by the constitution of the *United States*.

We are not called upon to say affirmatively what powers have been granted to the general government, or to what extent. Those powers, whether express or implied, may be plenary and sovereign, in reference to the specified objects of them. They may even be liberally construed in furtherance of the great and essential ends of the government. To this doctrine I willingly accede. But the question here is, not what powers are granted to that government, but what powers are retained by this, and, particularly, whether the states have

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absolutely parted with their original power of granting such an exclusive privilege, as the one now before us. It does not follow, that because a given power is granted to congress, the states cannot exercise a similar power. We ought to bear in mind certain great rules or principles of construction peculiar to the case of a confederated government, and by attending to them in the examination of the subject, all our seeming difficulties will vanish.

When the people create a single, entire government, they grant at once all the rights of sovereignty. The powers granted are indefinite, and incapable of enumeration. Every thing is granted that is not expressly reserved in the constitutional harter, or necessarily retained as inherent in the people. But when a federal government is erected with only a portion of the sovereign power, the rule of construction is directly the reverse, and every power is reserved to the member that is not, either in express terms, or by necessary implication, taken away from them, and vested exclusively in the federal head. This rule has not only been acknowledged by the most intelligent friends to the constitution, but is plainly declared by the instrument itself. Congress have power to lay and collect taxes, duties and excises, but as these powers are not given exclusively, the states have a concurrent jurisdiction, and retain the same absolute powers of taxation which they possessed before the adoption of the constitution, except the power of laying an impost, which is expressly *taken away. This very exception proves that, without it, the states would have retained the power of laying an impost; and it further implies, that in cases not excepted, the authority of the states remains unimpaired.

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This principle might be illustrated by other instances of grants of power to congress with a prohibition to the states from exercising the like powers; but it becomes unnecessary to enlarge upon so plain a proposition, as it is removed beyond all doubt by the tenth article of the amendments to the constitution. That article declares that "the powers not delegated to the *United States* by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The ratification of the constitution by the convention of this state, was made with the explanation and understanding, that "every power, jurisdiction and right, which was not *clearly* delegated to the general government, remained to the people of the several states, or to their respective state governments." There was a similar provision in the articles of confederation, and the principle results from the very nature of the federal government, which consists only of a defined portion of the undefined mass of sovereign power originally vested in the several members of the union. There may be inconveniences, but generally there will be no serious difficulty, and there cannot well be any interruption of the public peace, in the concurrent exercise of those powers. The powers of the two governments are each supreme within their respective constitutional spheres. They may each operate with

full effect upon different subjects, or they may, as in the case of taxation, operate upon different parts of the same object. The powers of the two governments cannot indeed be supreme over each other, for that would involve a contradiction. When those powers, therefore, come directly in contact, as when they are aimed at each other, or at one indivisible object, the power of the state is subordinate, and must yield. The legitimate exercise of the constitutional powers of the general government becomes the supreme law of the land, and the national judiciary is specially charged with the maintenance of that law, and this is the true and efficient power to preserve order, dependence and harmony in our complicated system of government. We have, then, nothing to do in the ordinary course of legislation, with the possible contingency of a collision, nor are we to embarrass ourselves in the anticipation of theoretical difficulties, than which nothing could, in general, be more fallacious. *Such a doctrine would be constantly taxing our sagacity, to see whether the law might not contravene some future regulation of commerce, or some moneyed or some military operation of the *United States*. Our most simple municipal provisions would be enacted with diffidence, for fear we might involve ourselves, our citizens and our consciences in some case of usurpation. Fortunately, for the peace and happiness of this country, we have a plainer path to follow. We do not handle a work of such hazardous consequence. We are not always walking *per ignes suppositos cineri doloso*. Our safe rule of construction and of action is this, that if any given power was originally vested in this state, if it has not been exclusively ceded to congress, or if the exercise of it has not been prohibited to the states, we may then go on in the exercise of the power until it comes practically in collision with the actual exercise of some congressional power. When that happens to be the case, the state authority will so far be controlled, but it will still be good in all those respects in which it does not absolutely contravene the provision of the paramount law.

This construction of the powers of the federal compact has the authority of Mr. *Hamilton*. In the thirty-second number of the *Federalist*, he admits that all the authorities of which the states are not explicitly divested, remain with them in full vigor, and that in all cases in which it was deemed improper that a like authority with that granted to the union should reside in the states, there was the most pointed care in the constitution to insert negative clauses. He further states that there are only three cases of the alienation of the state sovereignty; 1. Where the grant to the general government is, in express terms, exclusive; 2. Where a like power is expressly prohibited to the states; and, 3. Where an authority in the states would be absolutely and totally contradictory and repugnant to one granted to the union; and it must be, he says, an immediate constitutional repugnancy that can, by implication, alienate and extinguish a pre-existing right of sovereignty.

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The same view of the powers of the federal and state governments, and the same rules of interpretation, were given by him, in the discussions which the constitution underwent in our state convention, and they seem generally, if not unanimously, to have been acquiesced in by the members of that very respectable assembly. (See the *Debates of the New-York Convention*, published by *Francis Childs*.) These opinions may be regarded as the best evidence of the sense of the authors of that instrument, the best test of its *principles, and the most accurate cotemporary exposition to which we can recur. For every one acquainted with the history of those times, well knows that the principles of the constitution, in the progress of its adoption through the *United States*, were discussed in the several conventions, and before the public, by men of the most powerful talents, and with the most animated zeal for the public welfare. There were many distinguished individuals, and none more so than the one to whom I have referred, who had bestowed intense thought, not only upon the science of civil government at large, but who had specially and deeply studied the history and nature, the tendency and genius of the federal system of government, of which the *European* confederacies had given us imperfect examples, and to which system, as improved by more skilful artists, the destinies of this country were to be confided. Principles of construction solemnly sanctioned at that day, and flowing from such sources, as to be regarded by us, and by posterity, as coming in the language of truth, and with the force of authority.

I now proceed to apply these general rules to those parts of the constitution which are supposed to have an influence on the present question.

The provision that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, has nothing to do with this case. It means only that citizens of other states shall have equal rights with our own citizens, and not that they shall have different or greater rights. Their persons and property must, in all respects, be equally subject to our law. This is a very clear proposition, and the provision itself was taken from the articles of the confederation. The two paragraphs of the constitution by which it is contended that the original power in the state governments to make the grant has been withdrawn, and vested exclusively in the union, are, 1. The power to regulate commerce with foreign nations, and among the several states; and, 2. The power to secure to authors and inventors the exclusive right to their writings and discoveries.

1. *As to the power to regulate commerce.*

This power is not, in express terms, exclusive, and the only prohibition upon the states is, that they shall not enter into any treaty or compact with each other, or with a foreign power, nor lay any duty on tonnage, or on imports or exports, except what may be necessary for executing their inspection laws. Upon the principles *above laid down, the states are under no

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other constitutional restriction, and are, consequently, left in possession of a vast field of commercial regulation; all the internal commerce of the state by land and water remains entirely, and I may say exclusively, within the scope of its original sovereignty. The congressional power relates to external not to internal commerce, and it is confined to the *regulation* of that commerce. To what extent these regulations may be carried, it is not our present duty to inquire. The limits of this power seem not to be susceptible of precise definition. It may be difficult to draw an exact line between those regulations which relate to external and those which relate to internal commerce, for every regulation of the one will, directly or indirectly, affect the other. To avoid doubts, embarrassment and contention on this complicated question, the general rule of interpretation which has been mentioned, is extremely salutary. It removes all difficulty, by its simplicity and certainty. The states are under no other restrictions than those expressly specified in the constitution, and such regulations as the national government may, by treaty, and by laws, from time to time, prescribe. Subject to these restrictions, I contend, that the states are at liberty to make their own commercial regulations. There can be no other safe or practicable rule of conduct, and this, as I have already shown, is the true constitutional rule arising from the nature of our federal system. This does away all color for the suggestion that the steam-boat grant is illegal and void under this clause in the constitution. It comes not within any prohibition upon the states, and it interferes with no existing regulation. Whenever the case shall arise of an exercise of power by congress which shall be directly repugnant and destructive to the use and enjoyment of the appellants' grant, it would fall under the cognizance of the federal courts, and they would, of course, take care that the laws of the union are duly supported. I must confess, however, that I can hardly conceive of such a case, because I do not, at present, perceive any power which congress can lawfully carry to that extent. But when there is no existing regulation which interferes with the grant, nor any pretence of a constitutional interdict, it would be most extraordinary for us to adjudge it void, on the mere contingency of a collision with some future exercise of congressional power. Such a doctrine is a monstrous heresy. It would go, in a great degree, to annihilate the legislative power of the states. May not the legislature declare that no bank paper shall circulate, or be given or received in payment, but what originates from some incorporated bank of our own, or that none shall circulate under the nominal value of one dollar? But suppose congress should institute a national bank, with authority to issue, and circulate throughout the union, bank notes, as well below as above that nominal value: this would so far control the state law, but it would remain valid and binding, except as to the paper of the national bank. The state law would be absolute, until the appearance of the national bank, and then it

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would have a qualified effect, and be good *pro tanto*. So, again, the legislature may declare that it shall be unlawful to vend lottery tickets, unless they be tickets of lotteries authorized by a law of this state, and who will question the validity of the provision? But suppose congress should deem it expedient to establish a national lottery, and should authorize persons in each state to vend the tickets, this would so far control the state prohibition, and leave it in full force as to all other lotteries. The possibility that a national bank, or a national lottery, might be instituted, would be a very strange reason for holding the state laws to be absolutely null and void. It strikes me to be an equally inadmissible proposition, that the state is divested of a capacity to grant an exclusive privilege of navigating a steam-boat, within its own waters, merely because we can imagine that congress, in the plenary exercise of its power to regulate commerce, may make some regulation inconsistent with the exercise of this privilege. When such a case arises, it will provide for itself; and there is, fortunately, a paramount power in the Supreme Court of the *United States* to guard against the mischiefs of collision.

The grant to the appellants may, then, be considered as taken subject to such future commercial regulations as congress may lawfully prescribe. Congress, indeed, has not any direct jurisdiction over our interior commerce or waters. *Hudson* river is the property of the people of this state, and the legislature have the same jurisdiction over it that they have over the land, or over any of our public highways, or over the waters of any of our rivers or lakes. They may, in their sound discretion, regulate and control, enlarge or abridge the use of its waters, and they are in the habitual exercise of that sovereign right. If the constitution had given to congress exclusive jurisdiction over our navigable waters, then the argument of the respondents would have applied; but the people never did, nor

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*ever intended, to grant such a power; and congress have concurrent jurisdiction over the navigable waters no further than may be incidental and requisite to the due regulation of commerce between the states, and with foreign nations.

What has been the uniform, practical construction of this power? Let us examine the code of our statute laws. Our turnpike roads, our toll-bridges, the exclusive grant to run stage-wagons, our laws relating to paupers from other states, our *Sunday* laws, our rights of ferriage over navigable rivers and lakes, our auction licenses, our licenses to retail spirituous liquors, the laws to restrain hawkers and pedlars; what are all these provisions but regulations of internal commerce, affecting as well the intercourse between the citizens of this and other states, as between our own citizens? So we also exercise, to a considerable degree, a concurrent power with congress in the regulation of external commerce. What are our inspection laws relative to the staple commodities of this state, which prohibit the exportation, except upon certain conditions, of flour of salt provisions, of certain articles of lumber, and of pot and

pearl ashes, but regulations of external commerce? Our health and quarantine laws, and the laws prohibiting the importation of slaves, are striking examples of the same kind. So the act relative to the poor, which requires all masters of vessels coming from abroad to report and give security to the mayor of *New-York*, that the passengers, being aliens, shall not become chargeable as paupers, and in case of default, making even the ship or vessel from which the alien shall be landed liable to seizure, is another and very important regulation affecting foreign commerce.

Are we prepared to say, in the face of all these regulations, which form such a mass of evidence of the uniform construction of our powers, that a special privilege for the exclusive navigation by a steam-boat upon our waters, is void, because it may, by possibility, and in the course of events, interfere with the power granted to congress to regulate commerce? Nothing, in my opinion, would be more preposterous and extravagant. Which of our existing regulations may not equally interfere with the power of congress? It is said that a steam-boat may become the vehicle of foreign commerce; and, it is asked, can then the entry of them into this state, or the use of them within it, be prohibited? I answer yes, equally as we may prohibit the entry or use of *slaves, or of pernicious animals, or an obscene book, or infectious goods, or any thing else that the legislature shall deem noxious or inconvenient. Our quarantine laws amount to an occlusion of the port of *New-York* from a portion of foreign commerce, for several months in the year; and the mayor is even authorized under those laws to stop all commercial intercourse with the ports of any neighboring state. No doubt these powers may be abused, or exercised in bad faith, or with such jealousy and hostility towards our neighbors, as to call for some explicit and paramount regulation of congress on the subject of foreign commerce, and of commerce between the states. Such cases may easily be supposed, but it is not logical to reason from the abuse against the lawful existence of a power; and until such congressional regulations appear, the legislative will of this state, exercised on a subject within its original jurisdiction, and not expressly prohibited to it by the constitution of the *United States*, must be taken to be of valid and irresistible authority.

2. If the grant is not inconsistent with the power of congress to regulate commerce, there is as little pretence to hold it repugnant to the power to grant patents. That power only secures, for a limited time, to authors and inventors the exclusive privilege to their writings and discoveries; and as it is not granted, by exclusive words, to the *United States*, nor prohibited to the individual states, it is a concurrent power which may be exercised by the states, in a variety of cases, without any infringement of the congressional power. A state cannot take away from an individual his patent right, and render it common to all the citizens. This would contravene the act of congress, and would be, therefore, unlawful. But if an author

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or inventor, instead of resorting to the act of congress, should apply to the legislature of this state for an exclusive right to his production, I see nothing to hinder the state from granting it, and the operation of the grant would, of course, be confined to the limits of this state. Within our own jurisdiction, it would be complete and perfect. So a patentee under the act of congress may have the time of his monopoly extended by the legislature of any state, beyond the term of fourteen or twenty-eight years allowed by that law. Congress may secure, for a limited time, an exclusive right throughout the union; but there is nothing in the constitution to take away from the states the power to enlarge the privilege within their respective jurisdictions. The states are not entirely divested of their original sovereignty over the subject matter; and whatever power has not been clearly granted to the union, remains with them. Again, the power granted to congress goes no further than to secure to the author or inventor a right of property, which, like every other species of property, must be used and enjoyed within each state, according to the laws of such state. The power of congress is only to ascertain and define the right of property; it does not extend to regulating the use of it. That must be exclusively of local cognisance. If the author's book or print contains matter injurious to the public morals or peace, or if the inventor's machine or other production will have a pernicious effect upon the public health or safety, no doubt a competent authority remains with the states to restrain the use of the patent right. That species of property must likewise be subject to taxation, and to the payment of debts, as other personal property. The national power will be fully satisfied, if the property created by patent be, for the given time, enjoyed and used exclusively, *so far* as under the policy of the several states the property shall be deemed fit for toleration and use. There is no need of giving this power any broader construction in order to attain the end for which it was granted, which was to reward the beneficent efforts of genius, and to encourage the useful arts.

If, then, the respondents were in possession of a patent for their steam-boat, as original inventors, our statute prohibition, not being made against the use of steam-boats, as *per se* injurious, would possibly, before a competent tribunal, be obliged to yield to the patent right, as being founded on the paramount law. (a) But even this plea would not answer in this case; for if the respondents were in possession of such a patent, the state courts could not take notice of it. They cannot enforce a patent right, nor can they declare the patent void, if obtained by fraud or imposition. The acts of congress have vested the federal courts with the exclusive cognisance of all infringements of patent rights; and such was the opinion and decision of the Supreme Court of this state in a late case. (*Parsons v. Barnard*, 7 Johns. Rep. 144.) None of our courts could receive a plea of a patent right, in justification of a breach of the statutes: we should be obliged to send the party to the courts

(a) The Chief Justice requested it to be added, that the idea here intimated hypothetically, was not necessary to the argument, and, on more reflection, he thought that even that intimation might lead to error. He wished not

of the *United States*, in *order to test the validity of his patent, and to seek the competent redress.

But the respondents show no patent, and the appellants have not obtained their grant, as *inventors* of the steam-boat, and, therefore, the privilege is totally unconnected with the patent power. It seems to be admitted that congress are authorized to grant patents only to the *inventor* of the useful art. The act of congress of 25th *February*, 1793, (*Laws United States*, v. 2. p. 200,) applies only to the inventor, and the applicant for the patent must make oath that he believes he is the true inventor or discoverer of the art or improvement. The act of 22d *April*, 1800, (*Laws United States*, v. 5. p. 88,) extends the benefit of the former law to aliens, after two years' residence, on their making oath that such invention, art or discovery, hath not, to their belief, been known or used either in this or any foreign country. There cannot, then, be any aid or encouragement, by means of an exclusive right under the law of the *United States*, to importers from abroad of any useful invention or improvement. Such persons must resort to the patronage of the state governments, in which the power to reward their expensive and hazardous exertions was originally vested, and in which it still remains. The grant of 1798, was made to Chancellor *Livingston*, as "the *possessor* of a mode of applying the steam engine to propel a boat on new and advantageous principles." This power to encourage the importation of improvements, by the grant of an exclusive enjoyment, for a limited period, is extremely useful, and the *English* nation have long perceived and felt its beneficial effects. This will appear by a cursory view of the law of that country.

The creation of monopolies was anciently claimed and exercised as a branch of the royal prerogative. Lord *Coke* (3 *Inst.* 181) defines a monopoly to be "an institution or allowance by the king's grant, for the sole using of any thing;" and he considers such royal grants to have been against the ancient and fundamental laws of the realm. Parliament, at last interposed to check the abuse of these grants, which had been issued, under *Elizabeth*, with inconsiderate profusion; and by the statute of 21 *Jac.* I. c. 3, commonly called the statute of monopolies, there were due limitations placed upon the exercise of this branch of the prerogative. That statute, by a general sweeping clause, demolished all the existing monopolies that were not specially excepted; and some of those exceptions are worthy of our particular notice. In the first place, all grants of privileges by act of parliament were saved; *for no one ever doubted (unless it be since the origin of this controversy) of the power of the legislature to create an exclusive privilege. The statute also allowed grants to be made for a limited time, by the authority of the crown, for the sole working or making of any new manufacture *not before used in the realm*. Upon this clause it has been held by such distinguished judges as *Holt* and *Pollexfen*, (2 *Salk.* 447,) that if the invention be new in *England*, a patent may be granted, though the thing

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to be understood as saying that a state grant could, in any case, or before any tribunal, be questioned or controlled by a patent right.

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was practised beyond sea before; for the statute, as they observe, intended to encourage new devices useful to the kingdom, *and whether learned by travel or by study, it is the same thing.* In the case of *Darcy v. Allen*, which arose under *Elizabeth*, before the statute of monopolies, (11 Co. 84. *Noy*, 273,) it was admitted, in the interesting argument on the part of the defendant, as preserved in *Noy*, (p. 182, 183,) that where any man, by *his own charge and industry*, or by his own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade, that never was used before, and that for the good of the realm, the king might grant a monopoly patent. Thus, in 9 *Eliz.* there was a patent granted to *Hastings* for the sole making and selling for divers years, of *frisadors*, in consideration that he brought in the skill of making them *as they were made in Holland*. But in a suit on this patent, as it appeared that the defendant had used them before the patent, he was held not punishable for infringing the patent. So a like patent issued, in the beginning of the reign of *Elizabeth*, to one *Mathey*, for making certain knives with bone shafts, &c. on the suggestion that he brought the first use of them *from beyond sea*, but as the suggestion was false, he, on that ground alone, lost the benefit of his patent.

These cases clearly show that the uniform opinion, in *England*, both before and since the statute of *James*, has been, that imported improvements, no less than original inventions, ought to be encouraged by patent. And can we for a moment suppose that such a power does not exist in the several states? We have seen that it does not belong to congress, and if it does not reside in the states, it resides nowhere, and is wholly extinguished. This would be leaving the states in a condition of singular and contemptible imbecility. The power is important in itself, and may be most beneficially exercised for the encouragement of the arts; and if well and judiciously exerted, it may ameliorate the condition of society, by enriching and adorning the country with useful and elegant *improvements. This ground is clear of any constitutional difficulty, and renders the argument in favor of the validity of the statutes perfectly conclusive. And permit me here to add, that I think the power has been wisely applied, in the instance before us, to the creation of the privilege now in controversy. Under its auspices the experiment of navigating boats by steam has been made, and crowned with triumphant success. Every lover of the arts, every patron of useful improvement, every friend to his country's honor, has beheld this success with pleasure and admiration. From this single source the improvement is progressively extending to all the navigable waters of the *United States*, and it promises to become a great public blessing, by giving astonishing facility, despatch and safety, not only to travelling, but to the internal commerce of this country. It is difficult to consider even the known results of the undertaking, without feeling a sentiment of good will and

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gratitude towards the individuals by whom they have been procured, and who have carried on their experiment with patient industry, at great expense, under repeated disappointments, and while constantly exposed to be held up, as dreaming projectors, to the *whips and scorns of time*. So far from charging the authors of the grant with being rash and inconsiderate, or from wishing to curtail the appellants of their liberal recompense, I think the prize has been dearly earned and fairly won, and that the statutes bear the stamp of an enlightened and munificent spirit.

If the legal right be in favor of the appellants, the remedy prayed for by their bill is a matter of course. One of the learned counsel for the respondents, with his usual frankness, seemed, in a great degree, to concede this point.

Injunctions are always granted to secure the enjoyment of statute privileges of which the party is in the actual possession, unless the right be doubtful. This is the uniform course of the precedents. I believe there is no case to the contrary; and the decisions in the *English* Chancery, on this point, were the same before as since the *American* revolution; and we are, consequently, bound by them as a branch of the common law. It appears, by the facts stated in the bill, and which we must take to be true, as they have been sworn to, and are not answered or denied, that the appellants had been, for three years, in the actual and exclusive enjoyment of their statute privilege, when the respondents interfered to disturb that right and that enjoyment.

It will be necessary to attend, for a moment, to the most prominent **English* cases, on the subject of injunctions; and on this point I shall be very brief.

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In *Gyles v. Wilcox and others*, which was as early as the year 1740, (2 *Atk.* 141. S. C. 3 *Atk.* 269,) there was a bill filed for an injunction to stay the printing of a book, on suggestion, that the book, pretending to be a different work, was in truth, an invasion of the complainant's copyright, under the statute of *Anne*. The lord chancellor referred the cause, by consent, to arbitrators, to examine whether the one book was a copy from the other; and though that point was not clear, he allowed an injunction and continued it in the mean time. So, also, in the case of *Blackwell v. Harper*, in the year 1740, (2 *Atk.* 92,) a bill was exhibited to establish a right under a statute of 8 *Geo.* II. c. 13, for encouraging the arts of designing, engraving, &c. and to restrain the defendant from copying the complainant's engravings of medicinal plants, and an injunction was decreed, though the statute said nothing about an injunction, and had given, as against the offender, a forfeiture of the plates and sheets engraved, and an additional penalty of five shillings for every print, to be recovered by suit at law. In another case, in the same year, 1740, before the same chancellor, (1 *Ves.* 476,) he admitted, that when the right appeared by matter of record, or was grounded upon an act of parliament, it was a foundation for an injunction before answer.

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These cases I have particularly selected, because two of them were cases of injunction, founded on a statute right, and where the statute had also given a forfeiture, and because these cases were long before our revolution, and were the decisions of so correct and distinguished a chancellor as Lord *Hardwicke*.

It is impossible, in any cause, to produce cases more in point or more controlling; and they put the authority and duty to grant an injunction, in a case of clear statute right, beyond contradiction. There are many other cases in the *English* Chancery, to the like effect, all of which I shall not stay to examine. (*Baskett v. Parsons*, 1718, decided by Sir *J. Jekyl*, and cited in 13 *Ves.* 493. *Smith v. Clark*, *Dick.* 455. *Hicks v. Raincock*, *Dick.* 647. *Pope v. Curl*, 2 *Atk.* 342. *Bell v. Walker and others*, 1 *Bro.* 451.) It will be sufficient, by referring to a few of them, to show the uniform language of the equity courts. The case of *The City of London v. Pughs* (3 *Bro. Ch. Cas.* 374) arose as early as 1727, and as it was decided by the House of Lords, upon an appeal, it merits the more attention. The question *there was, on a penalty given by a lease of one hundred pounds an acre, for digging up the soil, and yet the court ordered that the chancellor issue an injunction until the hearing, to stay the trespass, notwithstanding the party had his remedy for the penalty. In the case of *Bolton v. Bull*, which was in chancery, as late as 1796, (3 *Ves.* 140,) there was a bill for an injunction against infringing a patent right for a fire engine, and it was granted, and the validity of the patent was left, in the mean time, to be tried at law. It was there admitted to be the most ordinary jurisdiction of the Court of Chancery, not to alter the possession until the right was decided, and the party in enjoyment of his patent privilege was considered as in such possession. In a late case, before the present Lord Chancellor *Eldon*, (*The Universities v. Richardson*, 6 *Ves.* 707) it was held, that in the case of a patent right, if the party gets his patent and puts it in execution, his possession, under color of that title, is good enough to enjoin a disturber from interfering, and to continue the injunction until it is proved at law that he had no title. In a still later case, (14 *Ves.* 130,) the court expressed itself in strong terms against the invasion of a patent right, and said, that unless the injunction was granted, any person might violate the patent, and the consequence would be, that the patentee would be harassed with litigation.

I cite these latter cases to show that the law has been settled, in *England*, for the last seventy years at least, and has been preserved in a steady, uniform course, under a succession of their ablest and wisest men. The principle is, that statute privileges, no less than common law rights, when in actual possession and exercise, will not be permitted to be disturbed, until the opponent has fairly tried them at law, and overthrown their pretension. And is not this a most excellent principle, calculated to preserve peace, and order, and morals,

in the community; and if it was not the law, yet deserving to be the law, and well worthy of our encouragement and sanction? The federal courts in this country have thought so; for under the patent law of congress, they have equally protected the right by injunction. The case of *Morse v. Reid* was an injunction bill filed in 1796, to restrain the defendant from reprinting *Winterbotham's History*, which, the complainant alleged, was an invasion of the copyright of his *American Geography*. The propriety of the injunction was not questioned; it issued in the first instance. The complainant recovered 1,500 dollars, *and the injunction was made perpetual. So in the late case of *Whitney v. Fort*, which arose in *Georgia*, upon a violation of the complainant's patent for a machine for cleaning cotton, an injunction was granted, in the first instance, and was afterwards made perpetual, at the Circuit Court, at which Judge *Johnson* presided. As far, then, as authority goes, it is in favor of the injunction, and if we are satisfied, in this case, of the appellants' right, we cannot hesitate about the remedy. The act which the legislature passed at the last session, making it expressly the duty of the Chancellor to grant an injunction as to all other boats except the two then built, proves very clearly the sense of the legislature that this was a fit and proper remedy in the case. Those two boats were excepted out of the law, merely because it was improper to interfere with a pending suit, and the statute did not impair the pre-existing remedy by injunction; it only made it more clear and peremptory thereafter; and there is no reason why the injunction should issue against one set of boats, and not against another.

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It would only be productive of litigation and mischief, to allow the respondents to continue the use of their boats, if the right be against them. Their counsel admit that they must not only forfeit the boats, but must answer in damages for all the intermediate profits. If the legal right be with the appellants, this is the proper court, and this is the proper time to declare it. This court, from its peculiar constitutional structure, unites with it the highest court of common law, and nothing would be more useless than to withhold an injunction until the chancellor had sent the question to be tried at law, when the judges before whom it is to be tried, are members of this court, and have already declared their opinion. The legal question can never be tried by a jury. It is not a question of fact. The single point is the constitutionality of the statutes. That point never can be more fully and more ably argued than it has been before this court, and if we are of opinion that the acts are constitutional, they *must* be obeyed. We are bound to cause them to be obeyed. There is no escape from this duty.

If we refuse the injunction, it ought to be for some substantial reason. We must not put it upon the mere *hoc volo, sic jubeo, sit pro ratione voluntas*. There must be some solid principle, that will correspond with the character, as well as satisfy the conscience of this court. If the laws are valid, it

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would be of pernicious* consequence not to arrest the further progress of their violation. It is impossible for any act to be committed which attracts more universal notice, and if wrong and illegal, none which has a more fatal influence upon the general habits of respect and reverence for the legislative authority. The boats cannot run but in the face of day, and in the presence, as it were, of the whole people, whose laws are set at defiance, nor without seducing thousands, by the contagion of example, into an approbation and support of the trespass.

I am sensible that the case is calculated to excite sympathy. I feel it with others, and I sincerely wish that the respondents had brought the laws to a test, at less risk and expense; for every one who had eyes to read, or ears to hear the contents of our statute book, must have been astonished at the boldness and rashness of the experiment. But in proportion to the respectability and strength of the combination, should be the vigor of our purpose to maintain the law. If we were to suffer the plighted faith of this state to be broken, upon a mere pretext, we should become a reproach and a by-word throughout the union. It was a saying of *Euripides*, and often repeated by *Cæsar*, that if right was ever to be violated, it was for the sake of power. We follow a purer and nobler system of morals, and one which teaches us that right is never to be violated. This principle ought to be kept steadfast in every man's breast; and above all, it ought to find an asylum in the sanctuary of justice.

I am accordingly of opinion, that the order of the Court of Chancery be reversed, and that an injunction be awarded.

LEWIS, Senator, and TOWNSEND, Senator, being related to some of the parties, declined giving any opinions.

The other senators declared their concurrence in the opinions delivered by the judges. The following order was, thereupon, unanimously adopted and directed to be entered:

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"Whereupon, after hearing counsel, as well for the appellants as for the respondents, upon the order of the Court of Chancery, complained of by the appellants, and considering and hereby declaring the exclusive privilege granted by the legislature of this state, to the appellants, as mentioned in their bill of complaint, *valid, and that the same ought to be enjoyed by them according to law;

"It is, therefore, ORDERED, ADJUDGED and DECREED, and this court doth, accordingly, ORDER, ADJUDGE and DECREE, that the order of the Court of Chancery complained of be reversed. And this court doth further ORDER, ADJUDGE and DECREE, that a writ of injunction issue, restraining and prohibiting the respondents from using and employing the boat or vessel, called the *Hope*, in the bill mentioned, on any of the waters of this state, in contravention of the legislative grant and privilege made to, and vested in, the appellants, as in their bill set forth; and that such injunction be continued until the final hearing of the cause in the Court of Chancery; and that the injunction ought then to be made perpetual, so long as the

exclusive right and privilege of the appellants shall continue under the acts of the legislature of this state, in the bill set forth; unless, on the final hearing of the cause, the equity contained in the appellants' bill shall be destroyed, by the new matter to be set forth and established by the respondents.

"And it is further ORDERED, ADJUDGED and DECREED, that the record be remitted to the Court of Chancery, to the end, that the order, judgment and decree, of this court, may be forthwith executed, by awarding such injunction."

Judgment of Reversal.

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*JAMES GRANT, FRANCIS ARTHUR, AND MARY HIS WIFE, (FORMERLY MARY GRANT,) ELIZABETH GRANT, JANE GRANT, ROBERT GRANT, WILLIAM GRANT, (THE SAID JANE, ROBERT AND WILLIAM, BY THE SAID JAMES GRANT, THEIR BROTHER AND GUARDIAN,) JONATHAN AIKINS, AND CHRISTIE GRANT, Appellants,

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against

MARIA DUANE, JAMES C. DUANE, WILLIAM NORTH, AND MARY HIS WIFE, SARAH DUANE, CATHARINE L. DUANE, ADELIA DUANE, SOLOMON BAKER, BENJAMIN BAKER AND NATHANIEL PARKER, Respondents.

THE bill in this cause was originally filed in the Court of Chancery, by *Maria Duane, William North* and *James C. Duane*, as *executors* of the will of *James Duane, Esq.* deceased, and *trustees* named in his will, and by *Solomon Baker, Benjamin Baker* and *Nathaniel Parker*, on the 17th June, 1799.

It is stated that *David Shaw* was seised of two tracts of land, the one originally granted to *Thomas Menzies*, the other to *John Watkins*, each containing 2,000 acres of land, situate in *Granville*, in the county of *Washington*. *Shaw* being indebted to *James Grant*, deceased, in one hundred and eighty pounds, mortgaged those lands to him, on the 26th November, 1765, for securing the payment of that sum, with interest, on a certain day specified in the mortgage, which contained a power of sale.

That on the 21st of July, 1766, *David Shaw, John Alexander* and *John Gregg* made a composition with their creditors, *and, in consequence thereof, by and with the consent and approbation of their creditors, assigned and conveyed all their estates to *James Duane*, deceased, *Lawrence Reade* and *Henry White*, also deceased, in trust for the creditors of *David Shaw, John Alexander* and *John Gregg*.

That until, and during the revolutionary war, the mortgaged premises remained in a great measure unoccupied, and settlers

No person can come into a court of equity, for a redemption of a mortgage, unless he is entitled to the estate of the mortgagor, or claims a subsisting interest under it.

S. in 1765, mortgaged a tract of land to G. to secure a debt. In 1766, S. & B. & C. his copartners in trade, being insolvent, made a composition with their creditors, and by

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indenture, tripartite, conveyed all their estates, real and personal, but without specifying the mortgaged pre-

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mises, to D., E. & F. and to the survivors and survivor, and the heirs of such survivor, parties of the third part, in trust for the creditors of S., B. & C. described as named, and whose debts were specified in a schedule, annexed, of the second part. S. died afterwards; and E. & F. two of the trustees named, died during the revolutionary war, and D. the surviving trustee, died in 1797. In 1799, the executors of D. and named as trustees in his will, filed a bill in chancery against the heirs of G. for the redemption of the mortgaged premises; and after replication was filed, and publication passed, the heirs of D. in

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1806, were made parties complainants. It was held that, after such a lapse of time, it must be presumed that the debts of S., B. & C. had been paid, and the objects of the trust satisfied out of the other property, or otherwise; the existence of any of the debts not being shown; and that the heirs of D. had not,

were deterred from entering upon and cultivating the same, by reason of their exposure to the incursions of the enemy.

That *Reade* and *White* died during the war, and *James Duane*, deceased, *survived* them. He died about the first of *July*, 1797, having made his will, and the respondents above-named, his *executors* and *trustees* of his estate.

That on the 28th of *December*, 1796, *James Duane*, since deceased, wrote to *Jonathan Aikin*, one of the appellants, and *executor* of *James Grant*, then lately deceased, saying, "*that he had not been able to discover where James Grant resided*," so as to pay him the money due upon the mortgage and offering to pay it to the appellants, who refused to receive the same.

That about the 20th of *February*, 1796, *James Duane*, deceased, demised the lands in *Menzies'* patent to the two *Bakers*, *Parker*, and six other persons, who hold and have improved the same under such demises.

That *Grant*, the mortgagee, died, leaving the appellants, his *executors*, *heirs* and *devisees*.

That since the death of the mortgagee, the appellants have sold the land contained in *Watkins'* patent, by virtue of the power contained in the mortgage, for about *four thousand pounds*, and brought ejectments against the *Bakers* and *Parker*.

They, therefore, prayed an injunction, an account, and redemption.

The defendants, now appellants, by their answers, admitted the seisin of *Shaw*, and that he had executed to *James Grant*, deceased, the mortgage stated in the bill, but stated that they knew nothing of the conveyance by *Shaw* and others to *James Duane* and others, stated by the respondents. They admitted the deaths of *Lawrence Reade*, *Henry White* and *James Duane*, as mentioned in the bill, but said they knew nothing of *Duane's* will. They stated that when the mortgage was executed, the lands comprised in it were of little value, and the mortgagee would have preferred to receive his money, but that *Shaw* having failed, he had no hopes of receiving it; for which reason, he, about that time, entered upon the land, placed settlers on it, made agreements with them, and expended money in surveying, improvements, &c. acting as the proprietor, *until his death*, in *April*, 1796, for a period of *above twenty-eight years*; that during all that time, no money was paid or tendered to him, nor any measure taken to redeem the estate; that several of the settlements and acts of ownership aforesaid, took place within three years after the date of the mortgage.

They stated that they believed that *James Duane* knew *James Grant*, deceased, and often saw him. They denied that the appellant, *Jonathan Aikin*, ever received such a letter as is stated in the bill, or that he ever had any money tendered to him by *James Duane*. They averred that the *Bakers*, *Parker*, and the other persons, who, as stated in the bill, took

leases from *James Duane*, deceased, settled upon *the lands under James Grant, and as his tenants*. That they knew nothing, however, of the leases said to have been executed by *Duane*, nor of any improvements stated to have been made under him. They claimed title to the lands under *James Grant*, deceased, whose right they considered, at his decease, as absolute and irredeemable; and they sold the land in *Watkins'* patent, under such title, as owners, and not by virtue of the power contained in the mortgage. They insisted upon the benefit of all the circumstances above stated, as fully as if they had pleaded them, and concluded by denying combination, &c.

General replications were filed to the answers, and, in 1804, a number of witnesses were examined on both sides. These depositions chiefly related to the acts of *Grant*, the mortgagee, and the possession of the mortgaged premises.

Joseph Whitney, a witness for the respondents, stated that, in *October*, 1796, he went with *Baker* to the appellant, *Grant*, to discharge the mortgage, and *Baker* made a tender of six hundred pounds which he had with him, in gold and silver, but that *Grant* refused to accept the tender, and would have nothing to do with *Baker*; that the respondents are in possession of the tract granted to *Menzies*, called the *South* patent; that the *North* patent was sold by *Grant's* executors, for about 8,000 dollars, except about fifty acres; that about twenty-five years ago, *Baker* and others were in possession of their respective farms, which they afterwards bought of the respondents; that when they took possession, they supposed *they were public lands, and that they should, therefore, be suffered to retain their possessions. Several witnesses on the part of the appellants proved the sale of lands in *Watkins'* patent, called the *North* patent, and that the deeds executed to the purchasers were in the same form, and had no reference to the power in the mortgage; the appellants claiming the estate absolutely, from length of possession under the mortgage.

The form of the deed referred to by the witnesses was made an exhibit in the cause; the grantors were *Jonathan Aikin*, *James Grant* and *Christie Grant*, executors of the last will and testament of *James Grant*, deceased, and authorized by the will to sell his lands. It was in the usual form of a deed from executors or trustees.

Several witnesses for the respondents, who had deeds from the executors of *James Grant*, deceased, testified that they claimed the right to sell, in consequence of length of possession under the mortgage and a lease. But the witnesses all took deeds similar to the one exhibited.

It was proved, on the part of the appellants, that *William Fairfield* was on the land in 1772, having purchased the possession of one *Comstock* in 1774, when he agreed with *Grant* for the purchase of four hundred acres, including the place on which he then lived. One *Corey* was also in possession at the same time, under *Grant*. *Amos Utter* testified that, in 1777, he saw *Fairfield* and *Corey* on the lands, and that about

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therefore, any interest which could entitle them to a redemption, but that the equity of redemption, if not wholly barred by the lapse of time, remained in the heirs of *S.* the mortgagor; especially, as the indenture produced by the complainants, and relied on by them as creating the trust estate, was not executed by the trustees, nor by the creditors, nor was any schedule annexed to it, and there was evidence

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affording a presumption, that the arrangement between *S., B. & C.* and their creditors, was either not consummated, or was abandoned, or superseded by some other agreement.

Where an objection is made in the court below of a want of parties, it may be insisted on, on appeal, in this court.

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eighteen years before his examination he moved to *Grenville*, when he saw *Parker* and *Baker*. *Parker* lived on the land formerly held by *Fairfield*, and *Baker* on that held by *Corey*. In 1791, *James Grant* had the land surveyed, according to the possessions, and told *Parker* and *Baker* to remain on the land, and he would sell to them.

Jeremiah Spicer and *Thankful Corey* also proved that the lands were known as *Grant's* lands; and that *Parker* and *Baker* were settlers in the *South* patent, and the settlers always acknowledged *James Grant* as the landlord. *Baker* purchased his possession of *Corey*. *Spicer* was employed by the settlers in the *North* patent, to purchase for them from the executors of *Grant*, who claimed the land, as absolutely vested in *Grant*, by right of possession; that *Baker* and other settlers wished purchases to be made for them, in the *South* patent, from *Grant*; but afterwards broke off, on account of *Duane's* claim.

James Earle surveyed the *South* patent about the year 1792, when the whole was under settlements made under *Grant*; *most of the settlements were made in 1784, about twenty years before the time of his examination. The settlers have since taken leases from *James Duane*.

Among the proofs was, also, a letter, dated the 22d *December*, 1791, from *James Duane* to *James Grant*, directed to *Grant*, at *Fredericksburgh*, in *Duchess* county, in which *Duane* requests *Grant* to send his papers to *New-York*, saying, that he had lately sold some of the land of *Shaw*, and expected soon to do *Grant* justice. It did not appear that any answer was given to the letter.

After publication had passed, and the cause had been several times set down and noticed for hearing, a motion was made to amend the bill of the respondents, by adding the heirs of *James Duane*, deceased, as parties; and an order for that purpose was granted, on the 13th *August*, 1806, and they were brought in as joint complainants in the cause.

At the hearing, the respondents produced an indenture, dated the 21st *July*, 1766, between *John Alexander*, *John Gregg* and *David Shaw*, copartners in trade, of the *first part*; and the creditors of *Alexander*, *Gregg* and *Shaw*, who were named, and whose debts were specified in the schedule annexed, of the *second part*; and *Lawrence Reade*, *Henry White* and *James Duane*, of the *third part*. This indenture recited that in consideration that the parties of the second part had agreed to release and discharge the parties of the first part from all debts due by them to the parties of the second part, &c. *Alexander*, *Gregg* and *Shaw* granted, &c to the parties of the third part, all the certain dwelling-house, &c. (describing the property,) and also all other the lands, tenements, hereditaments and real estate, whereof *Alexander*, *Gregg* and *Shaw* were jointly or severally seised, or entitled to, in law or equity, &c. Upon the special trust and confidence expressed and declared in the indenture, &c. and the parties of the first

part also assigned over all their personal estate to the parties of the third part, on the same trust, that is, that the parties of the third part should sell and dispose of all the property so conveyed and assigned to them, &c. and after discharging all mortgages and encumbrances wherewith the same might be in any way encumbered, &c. to distribute all the clear moneys, &c. among the creditors of the parties of the second part, whose debts are not secured by mortgage, in equal proportion, &c.; and upon the further trust, that if all the debts due from the parties of the first part, can be satisfied by a sale of part only of the premises thereby granted, then the parties of the third part, or the survivors or survivor of them, or the heirs of such survivor, shall in due form of law reconvey all the residuary and remaining part of the premises, unto the parties of the first part, their heirs and assigns, &c. And in case the whole property was converted into money, then the surplus after paying the debts, &c. was to be paid over to the parties of the first part, and the parties of the second part covenanted with the parties of the first part, to accept and receive the premises so granted and released to the parties of the third part, in full satisfaction of their respective debts, and that as soon as the parties of the first part had delivered up all their property, &c. that they, the parties of the second part, would seal and execute a sufficient release of each of their debts and demands against the parties of the first part. And further, that in case any of the creditors of the parties of the first part should refuse to become a party to that indenture, that then the parties of the second part should on the request of the parties of the first part, pursue and take the measures prescribed by law, for the procuring the parties of the first part a final discharge from all their debts, by the acts for the relief of insolvent debtors, &c. This indenture was executed by David Shaw, for himself and John Alexander & Co.

The respondents also produced a deed-poll, dated in December, 1767, executed by John Alexander and John Gregg; reciting that whereas by certain indentures of composition, &c. lately made and executed by and between Alexander and Gregg, and their late copartner David Shaw, deceased, of the first part, and the creditors of Alexander, Gregg and Shaw, whose names are specified in a schedule to the same indenture annexed, of the second part, and Lawrence Reade, Henry White and James Duane, of the third part, the parties of the second part had compounded and agreed with the parties of the first part, &c. and among other things, it was particularly covenanted and agreed to and with the parties of the first part, "that if any of the creditors of Alexander, Gregg and Shaw shall refuse to release and discharge Alexander, Gregg and Shaw, their heirs, &c. from the debts, sums of money, dues and demands, &c. that then and in such case, the same indentures, grant and assignment should be void and of none effect, and that the parties of the third part should, upon such refusal, reconvey the premises, &c. and should repay to John Gregg

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2,500*l.*, thereby covenanted and agreed to be paid or secured by **John Gregg, &c.* reciting also several other covenants as contained in the *indenture* of composition, but none of which were contained in the indenture before mentioned, produced at the hearing; and reciting further, that whereas the principal part of the creditors of *Alexander, Gregg and Shaw*, had executed the indenture, and that by reason of absence, &c. there was no prospect of the others executing the same; and by reason of the covenants above recited, the indentures were likely to become defeated, the estate of *Alexander, Gregg and Shaw* wasted, and *Alexander, Gregg and Shaw* embarrassed, &c. And whereas *Shaw*, since the execution of the indentures, had died; it had been agreed by the remaining parties that the recited covenants should be released and discharged; without which it would be impracticable to carry the composition into effect: *Alexander and Gregg* did, by the deed, thereupon release, &c. all the *recited covenants*, to *Reude, White and Duane, &c.* provided that all the other parts of the indenture, except the covenants so recited and released, should remain valid and effectual, &c.

A *lease* was also produced, dated the 20th *February*, 1796, from *James Duane* to *B. and S. Baker, Parker*, and six others, reciting that the lessees occupied the lands in the tract mortgaged by *Shaw* to *Grant*, called *Menzies'* patent, under the title of *Duane, &c.* and leasing the same for seven years; and *Duane* covenanted, that if the lessees would, at any time within the seven years, pay six hundred pounds with all arrears of rent, then he, or his heirs, would execute a deed of conveyance to them, for the land, free from all incumbrances, except the mortgage to *Grant*, if it should then be in existence, and which, as far as it should be just, should be satisfied out of the consideration money, &c.

The cause having been brought to a hearing, his honor, the chancellor, on the 1st *June*, 1810, pronounced his *decree*, the parts of which, it is thought material to state here, were,

That the heirs and legal representatives of *James Duane*, deceased, had a right to redeem so much of the mortgaged premises as were not sold by the executors and legal representatives of *James Grant*, deceased, previous to filing the complainants' bill, to wit, the 17th *June*, 1799, upon the terms and according to the principles and directions specified in the decree; and that the heirs and legal representatives of *Duane* were entitled to an account of the proceeds of the sales of so much and such parts of the mortgaged premises, as were sold by the executors and legal *representatives of *Grant*, previous to filing the bill of the complainants, &c. &c.

From this decree the defendants below appealed to this court.

The reasons for the decree were thus assigned by

THE CHANCELLOR. The mortgage in question was made on the 26th of *November*, 1765.

The assignment under which the complainants derive their title to the equity of redemption was made in 1766.

The bill was filed in 1799, which is thirty-three years after the date of the mortgage.

If the mortgagee did not enter till three years after the assignment, it would reduce it to thirty years; and it appears from the depositions of *William Fairfield* and *Thankful Corey*, that ——— *Corey* settled on *Watkins'* patent, under *Grant*, in 1774; and that *Fairfield*, in the same year, agreed to purchase of *Grant* four hundred acres, on part of which he was then settled. It appears, from the testimony, that both abandoned their possessions during the revolutionary war, that country then being its seat; and the complainants insist that the period of the war, as well from that circumstance, as the general analogy subsisting between an equitable and statute limitation, ought to be excluded.

The statute of limitations, passed the 26th of *February*, 1788, provided, that no part of the time, from the 14th of *October*, 1775, to the 21st of *March*, 1783, shall be considered as any part of the period during which the limitations are to run. If the time of settling by *Fairfield* and *Corey* is to be considered as the period of taking possession of the whole of the mortgaged premises, which I shall hereafter consider, the time intermediate that event and filing the bill, covered by the limitation, is not more than seventeen or eighteen years; and, by analogy to the statute of limitations, which has been uniformly preserved as to subjects of this nature, is not sufficient to bar the complainants from their equity of redemption.

The sale by the executors of the mortgagee, of *Watkins'* patent was made in 1796, and in the condition of the bond executed by them to the purchasers, on that occasion, they undertook to search, look out and procure the title of *James Grant*, their testator; a language indicating doubt and uncertainty as to the title, which could only have arisen from the circumstances attending *the possession of the mortgaged premises, for they could have no ground for doubt as to their right, as representing the mortgagee. The only doubt it would admit of was, whether the interest of their testator had, by length of time, ripened into an indefeasible estate in fee-simple, instead of a defeasible one by redemption.

To the complainants' right of recovery it was objected,

1. That the amended bill, by which the heirs of *James Duane* were introduced as parties, was not filed, and could have no effect till 1806.

2. That the deed of assignment did not pass the interest of the mortgagor in the mortgaged premises.

3. That actual seisin attached to the right, and so the seisin was from the date of the mortgage.

4. That *James Duane* obtained possession by collusion, and so it was not available to him.

5. That the tender was invalid, because *Baker* had no right to tender.

6. That there was a resulting trust in favor of *Shaw's* heirs, who ought to have been parties.

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I had no doubt as to the first point. The amended bill had a retrospective effect, and related to the time of filing the original bill, and I know of no authority or principle, which will warrant a different construction.

The second point arose on the indenture of assignment which is dated the 21st of *July*, 1776. [Here his honor stated the indenture.]

This indenture was executed by *David Shaw*, for himself and for *J. Alexander & Co.*

In *December*, 1767, *John Alexander* and *John Gregg*, executed a deed-poll, incorrectly reciting the indenture; also reciting that *David Shaw* was then dead, and pretending to discharge certain covenants and conditions contained in it, but which could not affect the interests of *David Shaw* in this estate.

The debts for which the composition was made, were those of the firm. The mortgaged premises were the estate of *David Shaw* solely. The indenture purported to grant all the estate of the firm and of the copartners separately, and the mortgaged premises could only pass, as included under the latter description; and so far as respected this property, it derived its efficacy from *Shaw's* grant only. The acts of the surviving partners could *not affect the disposition *Shaw* had made of it, unless they had satisfied all the debts, and then come in to receive contribution under the trust. The recital that the indenture was to be void, if all the creditors did not accede to it, was a subject of some discussion; but the recital is not correspondent to the contents of the deed. The alternative provided in it, being merely that if all the creditors should not accede, those that did, should aid the firm of *Alexander, Gregg, and Shaw* in procuring the benefit of the act of insolvency.

It is true, the deed is defective in omitting the names of the persons who acceded to the composition, but that was not essential to its operation, for one consideration expressed in it, the satisfaction of the encumbrances on the estate conveyed to the trustees, is a valid one, and if a deed is given for two considerations, and one fails, there is no doubt but the valid one will sustain it. If none of the creditors had acceded to it on that ground, and as it relates to the present controversy, it would still be operative; that they have acceded can only be collected from the recitals in the second deed, the parties to which were not privies as to this property. That deed was not adverted to in the pleadings, but it seems it was produced by the complainants at the requisition of the defendants.

The primary object of the trust was the disencumbering the property; the principal consideration was providing a fund for the satisfaction of the debts of the firm. For the execution of those trusts, the trustees were to respond to their *cestuy que trust*; but both at law and in this court, they were competent to assert their rights, in their own names, without introducing those of the creditors, as beneficially interested in

the trust fund. It is one of the most useful properties of such trustees, that they are capable, both at law and in equity, to assert the rights, and thereby bind the interests, of their *cestuy que trusts*, and it is the uniform practice in chancery, to permit them to sustain suits in that mode.

Having adverted to the period to which the limitation contended for can only apply, I shall now consider the acts of the mortgagee and his representatives, as connected with that subject. These consist of surveys, settlements, sales, and other assertions of ownership. [Here his honor stated the proofs in the cause.]

These settlements, till within a very few years, appear to have been made exclusively on *Watkins'* patent. There is no allegation, and no proof, that any definite terms were agreed on by **Grant*, the mortgagee, those of *Fairfield* and *Corey* excepted, and the first is stated as a purchaser in 1774, of four hundred acres, which is totally inconsistent with the estate held as mortgaged, but *Earle* also adds, that *Grant* informed him that the patent under which he sold, was derived by him from the crown, for his services in the war which ended in 1763. There is no evidence to connect *Baker's* title with that of *Fairfield*, but the evidence of Mrs. *Corey*, that he sold to *Baker*, and his declaration, testified to by *Earle*, that he held under a written contract, of which no evidence is given.

From the whole scope of the evidence, as relates to this point, it does not appear that a single lease has been given, or a written contract made by the mortgagee, the one to *Corey* excepted, any rent received, or any other than general acknowledgements of holding under the mortgagee ever made. The adapting the surveys to the different possessions mentioned by *Earle*, shows that there were no definite arrangements, and the singular complexion of the condition of the bond, executed by the executors of the mortgagee to the purchasers of *Watkins'* patent, to *search, look out, and procure* the title of their testator, shows that the settlements and the acknowledgements of the occupants of the land, in the opinion of the parties, even after the death of the mortgagee, were not so determinate as satisfactorily to fix the relation of landlord and tenant, even in their own estimation.

The mode of entry offers another consideration which may have some influence on this point.

Upon making a feoffment of two distinct parcels of land, in the same county, livery of seisin on one of them, by the feoffor to the feoffee, in the name of both, has been held to be sufficient as to both. So an entry on any part of a tract granted by the grantee, and a consequent possession, might enure to extend the constructive possession, in the whole extent of the grant, according to the right: but here is not the least evidence which, on any possible legal construction, can expound the acts of settlement, so as to make them commensurate with the patents described in the mortgage.

The first settlement, that of *Fairfield*, was limited to *four hun*

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as stated. It is not shown that the trust has been executed, or at all acted upon; and after such a lapse of years, the party ought to be held to strict proof.

Again, the equity of redemption was barred by the lapse of time. There was no payment, or tender of payment, either of principal or interest, on the mortgage, from its date, in 1765, to the time of filing the bill in 1799, a period of near thirty-four years. The pretended tender, by *Baker*, was in 1796, thirty-one years after the execution of the mortgage; but that tender was void, being made without competent authority.

There is not sufficient legal excuse shown by the respondents, why Mr. *Duane* did not redeem, in his life-time, or in due season. He was bound to seek the creditor for that purpose. The allegation that he was ignorant of the place of *Grant's* residence is not admissible. And, if true, that ignorance did not exist in 1791.

The *English* rule that to create a limitation in equity, there must be a *pedis possessio* of the premises, within twenty years, does not apply here. In *England*, the possession is always in the mortgagor or mortgagee. There are no vacant lands in that country; all are occupied and cultivated. The adoption of the common law in this state, must be considered to have been made no farther than as it was applicable to the existing circumstances of this country, at the formation of the constitution. There were large tracts of wild lands wholly unsettled; and with regard to such lands, the rule is that the seisin follows or accompanies the legal estate. (8 *Johns. Rep.* 269.) Immediately on the execution of the mortgage, *Grant* must be deemed to have been in possession of the mortgaged premises, for *Shaw* had no other than a legal possession; and neither he nor *Duane*, ever took actual possession, or exercised any act of ownership, *for above thirty years. *Grant*, on the contrary, followed up his right, by settling and improving the lands. The appellants show an actual *pedis possessio* of a part of the premises, with a claim of title to the whole. (1 *Caines' Rep.* 358.) The whole course of the appellants' conduct shows that they considered themselves as the absolute owners of the property, free from any equitable claim of the former owner.

The possession obtained by *Duane*, by an attornment of the tenants, after the death of *Grant*, must be deemed fraudulent; and it is a settled rule that if possession be obtained against a mortgagee by fraud, pending a suit, it must be restored, before there can be any redemption. (*Pow. on Mort.* 391. *Lant v. Crisp*, *Vin. Abr. Mort.* (T), p. 467. 2 *Eq. Ca. Ab.* 599. pl. 20.)

By analogy, an equity of redemption is barred where an action of ejectment would be barred. (3 *P. Wms.* 287. note.)

Again, a mortgagor cannot redeem where the mortgagee cannot compel the payment of the debt; the remedy is reciprocal. (1 *Pow. on Mort.* 386.)

The trust in this case did not go to the executors of Mr. *Duane*, but to his heirs; and they did not file the bill, and were only made parties in 1806, after publication was passed, and the cause set down for a hearing.

Again, here a descent has been cast, and that is sufficient to bar the redemption. In *Chapham v. Bowyer*, (1 Rep. Ch. 207. (110.)) See also *Saunders v. Hard*, *ib.* 184. *ib.* 127,) it was decided that, after a mortgage had been forfeited twenty years, and the estate descended to heirs, there could be no redemption. In *Isham v. Cole* (2 Vent. 340. 3 Atk. 225. 1 Ch. Ca. 102) a redemption of a mortgage of thirty-three years' standing was refused.

Van Vechten and Riggs, contra. It is a settled rule, that not only the mortgagor, but any person claiming an interest under him, may redeem; (1 Pow. on Mort. 343, 344, 345. 349. 1 Chan. Ca. 59. 1 Vern. 193. Nelson, 101. 1 Eq. Cas. Ab. 215. 2 Rep. Ch. 62. 1 Ch. Cas. 71. Doug. 22. 2 Atk. 44. Bunbury, 346. Com. Barnard's Ch. Rep. 30. 32;) as an assignee of a bankrupt, an heir, a tenant, a devisee or judgment creditor.

The answer admits the heirs of *Duane* to be the surviving trustees. The legal estate is vested in the trustees. The *Bakers* and *Parker* are lessees of *Duane*, with covenants that the lessee should pay off the mortgage, and the amount be deducted from the purchase-money, in case they elected to become purchasers before the expiration of the lease. They, therefore, had a right to redeem.

As to the objection, that the schedule was not annexed to the indenture produced, it may be said that it was not necessary that the creditors should be parties, provided the trustees accepted the deed, under the condition that it was for the benefit of the creditors. It is sufficient that the mortgagor has parted with all his interest and equity of redemption. It cannot be pretended that there are no creditors. *Alexander and Gregg* had no interest in the premises. *Shaw* was the person who had the equity of redemption, and it is not denied that he executed the indenture. The deed-poll was produced by the appellants, not the respondents. It is enough if we show a right to redeem, as the legal representatives of a surviving trustee, named in a deed, duly executed by a person competent to convey.

Courts of equity favor the right of redemption. All that the mortgagee is entitled to is his debt, with interest. Mortgages are not within the statute of limitations; and there is no period fixed, as an absolute bar to the equity of redemption; for equity has considered that the mortgagee is not injured, if he gets his principal, interest and costs; but the mortgagor may suffer, if he is compelled to part with his estate at an undervalue. (1 Pow. on Mort. 408.) Interest is always considered as an equivalent for the use of money. It is the compensation agreed on by the parties, for the delay of payment. (2 Johns. Rep. 614.) It is true, there are cases in which, on

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account of the difficulty of making up an account, after a long period, it will be presumed, *prima facie*, that the mortgagor has abandoned his equity of redemption; and twenty years after forfeiture and possession taken by the mortgagee, without any payment of the interest, has been fixed upon, as the time which affords that presumption. But the settlement of an account between the mortgagor and mortgagee, within twenty years, will preserve the equity of redemption; or if there is an agreement that the mortgagee shall hold the premises until he is satisfied out of the rents, time is no bar to the equity of redemption, not even sixty years, unless it appears that the mortgagee had been satisfied by the rents and profits, twenty years before, and the mortgagee had since that time continued in possession. But any acknowledgement of the mortgagee, as receiving interest, or keeping or settling an account of the mortgagee, will preserve the equity of redemption. (*Pow. on Mort.* 422. *Cas. in Ch.* 9. 2 *Ves.* jun. 22. *Mosely*, 189.) So a suit on the bond, after a decree of foreclosure, at any period, opens the equity of redemption.

As it respects the equity of redemption, the mortgagor is always considered as the owner of the land. (1 *Atk.* 603. 2 *Vern.* 401. *Doug.* 610. 1 *Caines' Cas. in Error*, 565.) Where the mortgagor continues in possession, no length of time will bar the equity of redemption; and if he is in possession of any part, he may redeem the whole. (*Rakestraw v. Brewster*, *Select Cases in Chan.* 55. *Cruise's Dig. Mort.* tit. 15. c. 3. s. 66, 67.) As to the possession of the mortgagee, in order that it should be sufficient to bar the equity of redemption, it must be an actual possession, or an actual reception of the rents and profits, such as would amount to a disseisin; and the time of the bar can only commence from the period of taking such actual possession. Here is no proof of any possession until 1777. *Corey* is said to have gone into possession in 1774, but there is no evidence that he acknowledged a title in the mortgagee. There was no rent paid, nor any writing, conveyance or agreement, which could fix the relation of landlord and tenant. The survey in 1791 was the first act of ownership on the part of the mortgagee. A possession of a part does not enure to the whole, where there is an adverse possession, or where the objects are entirely distinct and separate.

The letter from *Duane* to *Grant*, in 1791, shows that the former considered the equity of redemption as existing, and the latter does not deny it. If the period of the war is deducted, the period during which the mortgagee or the appellants prove themselves in possession, is not more than eighteen years. If, therefore, the analogy between legal and equitable bars is to be received, there is not a sufficient lapse of time to bar in this case. Equity adopts the bar of twenty years, if justice is thereby promoted, otherwise not. It is not an absolute and controlling bar, as at law. The bar must be pleaded, or the facts amounting to a bar, alleged in the answer. Again,

the bar commences from the time of forfeiture, or when the money is due. (1 *Ch. Rep.* 206. *Nelson*, 34.) There is nothing in the pleadings, or evidence, that shows when the money was due.

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The heirs of *Duane* were not parties to the bill originally filed; and it was allowed to be amended. This amendment has relation to the time of filing the original bill, and is part of the same record. The Court of Chancery will order a cause to stand over, in any stage of it, in order that proper parties may be added, so that an end may be put to litigation, by a final decree. (*Hind's Ch. Prac.* 21, 22. *Mitf.* 39. 174. 259, 260. *Coop. Eq. Pl.* 332. 2 *Atk.* 15. 3 *Atk.* 570. 2 *P. Wms.* 300. 2 *Ch. Cas.* 197.) In *Hickcock v. Scribner*, (3 *Johns. Cas.* 311,) this court directed the bill to be dismissed, or amended in the court below, by adding the proper parties, and the evidence taken in the cause to stand, saving all just exceptions.

But without the amendment, they were proper parties to redeem. *Duane* was one of the heirs, and *Parker* and the *Bakers* were bargainees as to the lands lying in *Menzies'* patent.

The indenture was for the benefit of *Shaw*, who might dispense with the execution of it by a party deemed unnecessary. A stranger cannot object to the execution. (5 *Johns. Rep.* 47.) *Shaw* mortgaged the property in 1765, and in 1766 conveyed it to trustees for the benefit of creditors.

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It is not necessary that the creditors, or *cestuy que trust*, should be made parties. *Harrison*, in his *Chancery Practice*, says that the *cestuy que trust* is ordinarily brought in as a party; but there does not seem to be any rule on the subject. When the suit is for the distribution of the trust fund, then the *cestuy que trust* ought to be before the court; but this is not necessary when the suit is brought to collect or to get possession of the fund. (21 *Vin. Ab. Mort.* 12. *Toth. Maxims*, 187.) The respondents are trustees for the representatives of *Shaw*, in the result, after the creditors are satisfied. Where the assignees of a bankrupt sue for the collection of the property, it is not necessary to make creditors parties. The appellants should either have demurred to the bill, for want of parties, or made the objection at the hearing. It is now too late to object that the creditors are not parties. And had the objection then been made, the chancellor would not have dismissed the bill, but have ordered the cause to stand over, in order that the necessary parties should be added. (2 *Br. P. C.* 174. 3 *Atk.* 110, 111.) In an ejectment at law, a new demise may be added to save the statute of limitations, and to promote the ends of justice, and such amendment is considered as part of the original declaration.

The appellants, in this case, cannot object to the leasing of the land by *Duane*. A power to sell includes a power to mortgage, and, *à fortiori*, a power to lease. The answer of the appellants does not allege any attornment fraudulently

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obtained; it, therefore, could not, on the principle laid down in the case of *James v. M'Kernon*, be objected by them.

T. A. Emmet, in reply. The objection of want of parties may always be made, at the hearing of a cause. *Harrison*, in his *Chancery Practice*, (*Hargr. Ch. Prac.* 517,) says, "A trustee may in some cases sue in his own name, but ordinarily a *cestuy que trust* must be made a party." In another place, (*Ib.* 81, 82,) he lays down the rule, that a "*cestuy que trust* must in all cases be a party; but the trustee need not, especially, if the *cestuy que trust* undertakes for him." (*Finch's Pr. in Chan.* 275. *Bunb.* 53.) It is not stated in the bill that there were any heirs of the mortgagor; and the creditors have either been paid in money, or must be presumed to be paid, from lapse of time. *Shaw* died, and by the revolution his heirs became aliens. A mere trustee, who has no legal or beneficial interest in the estate, now claims it. The land was *mortgaged for its value, and *Shaw* was an insolvent debtor. Is it equity to take this land from the mortgagee, and give it to one who has paid nothing, nor advanced any thing to redeem it? *Duane* is, at best, but a mere trustee. And is not the mortgagee also a trustee for the mortgagor? A mortgagee in possession will hold against an *escheat*. If the property was *escheated*, *Duane* has no equity, for there must be parties behind the trustee to raise the equity.

Again, the respondents claim under a trust deed which is of no effect. That deed is the only title they set up to the right of redemption. The consideration of that deed was the covenant, on the part of the creditors to release the debts. As to *Shaw*, therefore, the deed is without consideration. The mere nominal consideration of ten shillings, will not be regarded in equity. The deed is not executed by the creditors or trustees. It was an inchoate transaction. It never was completed. The *deed-poll* speaks throughout of indentures of composition. There is not a single clause recited in that deed, consistent with the deed of trust produced. Can it be presumed that *Duane*, the trustee, was so incompetent as to mistake in the recital of every covenant the deed was said to contain?

If *Duane* had no right under the deed of 1766, then the *Bakers* and *Parker* cannot be tenants. Though no fraud is charged, yet they could not *attorn* to *Duane*, without fraud. They cannot ground a right to redeem on an act which betrayed the interest of *Shaw*.

The words of the trust, in this case, were restrictive; and giving a lease, after so long a time had elapsed, was inconsistent with the trust. It was not a conditional sale, like a mortgage. *Duane* could not force the *Bakers* and *Parker* to purchase, if they refused; and it is no bargain, unless both parties are bound.

The parties to the bill, in 1799, had no interest, when the representatives of *Duane*, in 1806, were made parties, for their rights were then barred.

Where no time of forfeiture is mentioned, it is immediate;

but if the time cannot be ascertained, it must be a reasonable time, as a year, or six months, from the execution of the deed.

It is an objection to allowing a redemption, where the party seeking it has paid little or nothing for the right. (*Fleetwood v. Templeman*, *Barn. Ch.* 187.)

In *Laughton v. Tracy*, (2 *Ch. Rep.* 30,) the objection was that the deed of trust was void, as there no creditor was made a party, nor any schedule *of debts annexed; but this was considered as only evidence of fraud, and did not render the deed void, it appearing to have been executed *bona fide*.

The mutilated deed produced in this case, with the schedule of creditors torn off, is evidence that it has been abandoned or cancelled. If so, the respondents can derive no title from it to redeem.

Again, *Grant* took this mortgage from an insolvent debtor, as the only practicable security. It was a mortgage of wild land, of little value, at the time; and he could only look to the increase of its value, by lapse of time, and by improvement, for the reimbursement of his principal and interest. *Grant*, as mortgagee, had the legal possession, and had a right also to take actual possession of the premises. It is therefore, under these circumstances, a fair and equitable presumption, that he did so perfect his title, *bona fide*, in satisfaction. The mortgagor, an insolvent debtor, died; what other remedy was there but the land? The trustees made no attempt to appropriate these lands, for thirty years, after the death of *Shaw*. Is it not, then, a fair presumption, that they left *Grant* to take the land, for his debt, as there were no other funds out of which he could be paid?

The land was called *Grant's* land. It may have been morally wrong in him to have represented it as absolutely his own, but this shows that he claimed title to the land.

The law of mortgages in *England*, has grown up, since all the lands in that country have been in actual occupation and under cultivation. Possession there commences from the forfeiture. (2 *Cruise's Dig.* 152. 1 *Fonb. Eq.* 332. b. 1. c. 4. s. 27. note 3. *Wils.* 34. 1 *Rep. in Chan.* 127.) In this country, an actual *pedis possessio* of the whole ought not to be required, on principles of policy and justice. A mortgagee having the legal possession, when there is no adverse possession against him, when no interest or principal is paid, ought to be deemed as in the actual possession. A contrary doctrine would lead to this, that no lapse of time could bar an equity of redemption in wild lands; but the mortgagee must occupy and cultivate them, if he means to acquire such a possession as may bar the right of the mortgagor to redeem. *Comstock* settled on the land, under *Grant's* right, and a possession of a part is sufficient in ejectment. (1 *Caines' Rep.* 358.)

[SPENCER, J. The principle was settled, in this court, in a case respecting *Livingston's Manor*, that an actual possession

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(a) See *Jackson, ex dem. Livingston, v. Schutt*, cited by *Kent, Ch. J. in Jackson v. Lunn*. (3 *Johns. Cas.* 118.)

of *tenants in different parts would draw to it the possession of the wild and unsettled part of the same patent.](a)

In *Hales v. Hales*, (1 *Ch. Rep.* 105,) a sleeping mortgage of forty years was presumed to be paid. Where there is no other remedy for the debt but the land, there can be no redemption.

The acknowledgement by a mortgagee to save the right of redemption, must be deliberate and explicit. A casual conversation between two persons is not sufficient.

Eight witnesses testify that the appellants sold the land as their own, though the title was at first by mortgage. The executors sold by virtue of the power in the will of *Grant*. Whether they had a legal power or not, is immaterial. It shows that they did not sell under the mortgage.

The letter of *Duane*, unanswered and unnoticed, is evidence of nothing. The fraud as to the attornment to him, was matter of law, arising from the facts set forth in the pleadings; it was not necessary to put it in issue.

The heirs of *Duane* did not come in until 1806, and they ought not, by a notion of reference back to the commencement of the suit, to stand on better ground than they otherwise would have done. *James C. Duane* took no step, as heir, until 1806. Suppose after the heirs were admitted as complainants, the executors of *Duane* had been struck out as useless parties, could they be considered as having filed their bill in 1799?

THOMPSON, J. Whoever comes into a court of justice to seek redress, must show in himself some interest in the subject matter of the claim set up, or it must appear that his name is used *pro forma*, for the benefit of the party really in interest. In the present case, the bill filed in the Court of Chancery, had for its object the redemption of a mortgage given by *David Shaw* to *James Grant*, bearing date the 25th of *November*, 1765. If the respondents have shown no interest in themselves, or a right to redeem the mortgage, on their own account, or on account of others, with whom some connexion is shown, and whose interest they have a right to represent, their claim cannot be supported, notwithstanding some other person might have a right to enforce the *same claim. It cannot be allowed to them to speculate on the claims of others, and redeem at their peril, and then litigate with those who may have the right.

No person can come into a court of equity for a redemption of a mortgage, but he who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him. (1 *Pow. on Mort.* 343. 381, 382. 1 *Vern.* 182.) The respondents claim the right to redeem, in consequence of a deed given by *David Shaw*, (the mortgagor;) together with *John Alexander* and *John Gregg*, to *James Duane*, and two others, of whom *Duane* was the survivor, bearing date the 21st of *July*, 1766. This deed is the title on which they rest; and that title is denied by the appellants, in their answer in the Court of Chancery.

And it is competent for them here, to contest its legal effect and operation, or show that it is null and void.

The objection to the respondents' right to redeem, does not strictly fall within that class which relates to a defect of parties, but strikes at the merits of their claim, by totally denying any interest whatever in them. But if the objection be considered as resting on the want of parties, it having been made in the court below, it may be insisted on here. This is a deed in trust, for the benefit of creditors, and it will be perceived from the date of it, that the claim now set up is a very stale one, so that all reasonable presumptions may and ought to be indulged against it. After the lapse of thirty or forty years, such a claim ought to be viewed with a jealous eye, unless accompanied with a satisfactory excuse for the delay to assert it. The deed given to the trustees was for the purpose *only* of paying the debts of the grantors, and it is no more than reasonable to presume, that that purpose has been accomplished. These debts must have been long since barred by the statute of limitations, and the legal presumption of payment. The *trust* has, therefore, been *executed*. It ought to be observed, that the mortgaged premises were the sole and exclusive property of *Shaw*, and not the property of the grantors jointly. Nor is there in the deed of trust, any specification of those lands, although there is of other real property. They are comprised in the general descriptive clause in the deed. And the presumption is strong and almost irresistible, that the object of the trust was answered out of other property included in the trust deed; especially, as it did not extend to the payment of debts secured by mortgage. And the trustees probably chose rather to resort to property unencumbered, than to discharge the encumbrance on this land, which was, most likely, at *that day*, nearly its full value. It was not the intention of the grantors, by this deed of trust, that the trustees should take more property than enough to satisfy the debt. And such is the legal effect and operation of the deed. For it expressly provides, that if the debts could be satisfied by sale of a *part* only of the premises thereby granted, the trustees should re-convey the residue. A claim of a right to execute this trust, without showing that there are yet debts unpaid, is against the spirit and intention of this covenant. If all the debts were paid, the trustees were bound to re-convey; and equity, in such cases, will presume that done which ought to have been done. It appears to me, therefore, that the respondents have failed to show a subsisting interest, under the mortgagor, by not showing the existence of any debts yet to be satisfied out of the trust estate. If the trust has been executed without having recourse to the lands in question, they fall under the residuary part, which, as it appears from the deed itself, cannot belong to the trustees or their heirs. And the lapse of time is, of itself, amply sufficient to warrant the presumption of an execution of the trust.

I have thus far considered the respondents' claim, on the
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supposition that the deed in trust, now set up, was the deed under which the composition and settlement of the debts of *Alexander, Gregg and Shaw*, were made. There is, however, strong ground for the presumption, that the arrangement contemplated between the parties, of which the deed only forms a part, was either never consummated, or was abandoned or superseded by another arrangement. The deed itself is not produced. Although it purports to contain covenants on the part of the trustees and creditors, it does not appear to have been executed by either of them. Reference is made to a schedule, purporting to be annexed to the deed, and to form a part of it, but which does not now accompany it. All this tends very strongly to show that the signing of this deed by *Alexander, Gregg and Shaw*, (which was on their part imperfect, as *Shaw* could not execute it for *Alexander*,) was only an inchoate transaction, and never consummated. This presumption is rendered almost certain, by the recitals in the deed of *Alexander and Gregg*, of *December, 1767*. No objection can be made to these recitals, by reason of this being a deed-poll. It is a deed to *Duane*, and the other trustees, and for their benefit. And the inference is irresistible, that it was *accepted* by them, and if so, they are bound by the recitals. The express object of this deed appears to have been, to release and discharge the trustees *from some of the covenants contained in a deed of composition before *executed* by *Alexander, Gregg and Shaw*, of the first part, their creditors, whose names were specified in a schedule thereto annexed, of the second part, and the trustees of the third part. It expressly recites that the greater part of the creditors had duly become parties to, and executed the deed of composition. The deed produced is not so executed. The covenants recited are very different from those contained in the deed produced, notwithstanding the recitals purport to be *in hæc verba*. By the recital, the deed of composition was to be *void* and of no effect, if any of the creditors should refuse to release and discharge their debts. And on such refusal the trustees covenanted to reconvey. In the deed before us, no such condition or covenant is to be found. The recited deed purports to contain a covenant, on the part of the trustees, to pay *Gregg* 2,500*l.* if the creditors should refuse to release their debts; no such provision is contained in the deed produced. Other variances might be pointed out, but enough has been shown to justify the conclusion, that the deed referred to by these recitals is not the one produced, and on which the respondents rest their title; and if this deed be put out of view, there is nothing to show that the mortgaged premises were ever conveyed to the trustees. For admitting there was another deed of composition to which the recitals refer, there is no evidence that it included the lands in question.

This view of the case renders it unnecessary for me to examine whether the equity of redemption is not barred by the lapse of time, and the possession held by the mortgagee and

his representatives. The case presented is certainly a very strong one on this point. It will be time enough, however, to decide it, when the heirs of *Shaw*, who alone, from any thing that appears, are entitled to redeem, shall think fit to ask a redemption. At present, it is only necessary to decide on the rights of the respondents, and, as I am satisfied they do not show themselves entitled to redeem, I think the decree of the Court of Chancery ought to be reversed.

This being the unanimous opinion of the court; it was thereupon, ORDERED, ADJUDGED and DECREED, that the decree of the Court of Chancery be reversed, that the respondents' bill be dismissed; that the respondents pay to the appellants their costs in the Court of Chancery, to be taxed, and that the record be remitted, &c.

Judgment of reversal.

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A

ACTS OF THE LEGISLATURE.

See STATUTES.

ACTION.

1. For an injury to personal property or personal rights, which are of a transitory nature, an action may be brought wherever the defendant is to be found. *Glen v. Hodges*, 67
2. A. remitted 500*l.* to B. in London, to pay a bill for the same sum, drawn by his attorney, C., on B., pursuant to an agreement between them. The bill having been presented for payment before the funds reached the hands of B., it was returned protested. Afterwards, another bill, drawn also by C. as attorney of A. in favor of D., for 112*l.* 10*s.* was presented to B., who accepted and paid it out of the 500*l.* which had, in the mean time, come to his hands. It was held, that though the 500*l.* was placed in the hands of B. for a specific purpose, yet C. had no right of action against D. to recover back the money so paid to him, but must look to the other parties, to rectify the mistake, if any was made. *Dey v. Murray*, 171

See SLAVES. AWARD, 4. AGREEMENT. ASSUMPSIT, 2. FREIGHT. OFFICER, 2, 3, 4.

ACTION FOR MONEY HAD AND RECEIVED, &c.

1. Money collected under a regular judgment, cannot be recovered back in a new suit, on the ground that evidence had since been discovered of a good defence, which existed before the judgment. *White v. Ward and Aylesworth*, 232
2. Where A. gave a promissory note to B. payable on demand, and B., two years after, transferred the note to C. who sued A. and recovered the amount, though A. had previously paid it to B.; it was held, that A. having neglected to set up the payment to B. as a defence to the suit of C., could not maintain an action for money had and received, to recover back the money paid to B. *Leomis v. Pulver*, 244
3. An American ship, with a cargo owned by American citizens, sailed from England for New-York, the 2d December, 1810, before the proclamation of the President of the United States, of the 2d November, 1810, was known there; and arrived at New-York, the 18th February, 1811, and was regularly reported at the custom-house. On the 19th February she was seized by the collector of the customs, for a breach of the non-intercourse acts, and libels filed against the ship and cargo, on the 27th February. After the act of congress of the 2d March, 1811, the seizure of the property was withdrawn, and the vessel and cargo liberated, as far as the custom-house and its officers were concerned; but they were detained by the marshal, who refused to deliver them up, without an order from the clerk of the District Court of the United States. The owners paid the costs of the attorney of the district and of the clerk of the court, who refused to give such order for the delivery of the property, until his fees were paid. In an action of *assumpsit*, for money had and received, brought by the owners against the clerk, to recover back the money so paid, it was held that the vessel and cargo were not equitably liable to condemnation, and the seizures having been withdrawn, the owner was not subject to costs; and the payment of them not being a voluntary act, being exacted by the officer, *colore officii*, as a condition of the order for a redelivery;

the exaction of them was illegal, and the costs might be recovered back in an action of *indebitatus assumpsit*, at common law. *Clinton v. Strong*, 370

4. Though it belongs exclusively to a court in which a suit has been originally instituted, to award costs; yet if the suit be discontinued, for want of cause, without any decision of the court, the exaction of costs is an act in *pais*, and the money may be recovered back by a suit against the officer, in any other court of competent jurisdiction, *ib.*
5. An action of *indebitatus assumpsit* for money had and received lies against a collector of the customs of the United States, to recover back duties or light money, wrongfully demanded, and paid compulsorily, or in order to obtain the clearance of the vessel; and without showing any notice not to pay over the money. *Ripley v. Gelston*, 201

See PARTNERSHIP, 2. AGREEMENT, 1. ACTION, 2.

ACTION ON THE CASE.

- A daughter of the age of nineteen years, with the consent of her father, went to live with her uncle and aunt, for whom she worked when she pleased, and the uncle agreed to pay her for her work: but there was no agreement for her continuance in his house, for any time. While so in the house of her uncle, she was seduced and got with child, and immediately after returned to her father's house, where she was maintained, and the expenses of lying in paid by him: though if that misfortune had not happened, she had no intention of returning to reside with her father: It was held, that an action on the case, for debauching and getting his daughter with child, *per quod servitium amisit*, was maintainable by the father, against her seducer; the father not having deposed himself of his power to claim the services of his daughter; and the supposed relation of master and servant was to be presumed, from his right to her services, arising from his liability to maintain and provide for her, while under age. *Martin v. Payne*, 387

ACTION, *qui tam*, &c.

- It is in the discretion of the court, under the statute, (*sess.* 11. c. 9. s. 8,) to allow an informer or plaintiff in a popular action, on a penal statute, to compound, upon such terms as they think fit. And it is a general rule, in the exercise of this discretion, to require, as one of the terms of granting leave to compound, that the moiety of the penalty given to the people be paid, unless under special circumstances, when leave to discontinue on payment of the costs only, will be granted. *Bradway, qui tam*, &c. v. *Le Werthy*, 251

ADVERSE POSSESSION.

See EJECTMENT, 2, 3, 4, 5, 6, 7. DEED, 1, 2, 3.

AGENT.

- Notice to an agent not to pay over to his principal, is not necessary, where the payment is compulsory, and is not made expressly for the use of the principal. *Ripley and others v. Gelston*, 201

See DEED, 8. ASSUMPSIT. DUTIES.

AGREEMENT.

1. In September, 1803, A. entered into an agreement with B., to sell and convey to him a certain piece of land, for which B. was to pay to him 400 dollars; 100 dollars on the 1st January, 1805; 100 dollars on the 1st January, 1806; and the residue in two years

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thereafter, and the deed was to be executed, when one half of the purchase-money was paid, &c. At the time of the contract there was a prior mortgage on the land from A. to C., dated in February, 1802, and registered in July, 1802, for securing the payment of a sum of money, in five annual instalments. B. having paid to A. 83 dollars, on the contract between them, brought an action of *assumpsit*, to recover back the money, on the ground of fraud. It was held that the mere fact of the existence of the mortgage, at the time the contract was made, was not evidence of fraud, so as to vacate the agreement, and give B. a right to disaffirm it; for it might be, that A. would have paid off the mortgage before the time he was to convey the land to B., so as to give him a good title: and, at least, B. ought first to have paid the one half of the purchase-money, and so put himself in a situation to demand a deed before he charged A. with a default. *Greenby v. Chaceors*, 126

2. A contract or agreement to sell and convey land, upon the performance of certain acts, to be performed by the purchaser at a future period, does not, of itself, give a license to enter on the land, much less a license to enter and commit waste, by destroying timber. *Cooper v. Stetter*, 331
3. Nor does an agreement made with one of several purchasers, that until all of them had executed the contract of purchase and a certain bond for the performance of its covenants, "no timber should be cut on the land," imply a license to the purchasers, after the contract and bond are so executed, to commit waste, by cutting and carrying away the timber, *ib.*
4. The most that can be implied by such a contract and agreement, is a permission to the purchasers to enter, in the mean time, as tenants at will, and occupy the land, in a reasonable manner, as tenants at will may lawfully do, *ib.*
5. A. leased a farm to B., and in an action by B. against A. he pleaded, by way of set-off, a demand for pasturage, founded on a parol agreement, made at the time of the lease, that B. was not to use the pasture land, without allowing A. for it. This parol agreement was held to be without consideration and void. *Tryon v. Mooney*, 358
6. Where an agreement was, that A. and B. should sell and convey to C. a parcel of land, and payment was made by C. to A., who, in fact, had no legal title in the land; it was held that B. could not, afterwards, object to such payment, but it was, in effect, the same as if paid to him. *Waters v. Travis*, 450

See ENTRY ON LAND. ASSUMPSIT, 2. CHANCERY, 7, 8, 9, 10, 11, 12, 13.

ALIEN.

Land was conveyed to P. an alien, under the act of 2d April, 1790, (sess. 21. c. 72,) and his agent leased the land, by a parol demise, from year to year, reserving rent, and afterwards took a promissory note from the tenant for the arrears of rent, payable to P. In an action brought on the note, by the administrator of P. it was held void under the statute. *Troup, Adm'r, v. Mullenden*, 303

AMENDMENT.

1. An execution returnable out of term is not void, but may be amended. *Cramer v. Alstyne*, 586
2. *Aliter*, as to mesne process, *ib.*

See PRACTICE, 3.

APPEAL.

See COURT OF ERRORS.

ARBITRATION.

See AWARD.

ASSIGNMENT

A. gave a note or due-bill to B. in the following words: "Due to B. 170 dollars, value received." B. endorsed his name on the note, and delivered it to C., who demanded payment of the note from B. who did not show him the note or the endorsement; nor did he explicitly state that the note had been assigned to him; and B. afterwards paid the amount to A., and took his receipt in full, the note still remaining in the hands of C. In an action brought

by C. against A., in the name of B. it was held, that there was not sufficient evidence of notice of an assignment given by C. to A. and that the mere endorsement of such a note or paper was not, of itself, conclusive evidence of an assignment of it. *Maghan v. Mills*, 64

See SHERIFF.

ASSUMPSIT

1. *Assumpsit* lies against a collector of the customs, to recover back light money, wrongfully demanded, and paid compulsorily, or in order to obtain a clearance, which was refused, until the money was paid, without showing any notice to the collector not to pay over the money to the government of the United States. *Ripley and others v. Gelston*, 201
2. A. sued B. on a written engagement, promising, if C. did not pay A. for the goods delivered to him, on the recommendation of B., B. would be responsible for the amount. C. failing to pay, A. sued him for the goods, and recovered judgment, on which execution was issued, and returned nulla bona, by the officer, but under circumstances which were supposed to make the officer liable for the debt. A. afterwards sued B. on his undertaking, and B. set up the proceedings, &c. against C. in his defence. It was held, that C. was liable on his promise to A. and that the matter set up in defence, was no discharge; that A. having prosecuted C. to judgment and execution, without effect, was not bound to go further and prosecute the officer, for his supposed liability. *Leonard v. Giddings*, 355

ATTORNEY

1. In an action brought by an attorney, before a justice, to recover his fees in a suit in the common pleas, the only evidence of his employment was that of the attorney of the opposite party, who said that the plaintiff had acted as attorney for the defendants in that suit. This was held not to be sufficient evidence of the plaintiff's having been employed by the defendants. *Holchies v. Le Roy and Rodgers*, 142
2. Though it may not be requisite, in a suit by an attorney for his costs, to prove the original employment of him, by the party, yet some recognition of him by the party, in the progress of the suit, is necessary to be shown, *ib.*
3. An attorney, defendant, cannot waive his privilege, for it is not allowed for his own sake, but for the sake of the court, and the suitors in it. *Scott v. Van Alstyne*, 216
4. It is sufficient for the plaintiff who proceeds by bill, against an attorney, that the defendant is an attorney of record; and if the attorney wishes to get rid of his privilege, he must apply to the court, who will strike his name off the roll, unless the application is made to avoid an impending censure of the court, *ib.*
5. The court, from general principles of equity and policy, will always look to the dealings between attorneys and their clients, and guard the latter from any undue consequences resulting from a situation, in which they may stand unequal. *Starr v. Vanderheyden*, 253
6. And where a judgment was entered at the suit of an attorney against his client, by virtue of a bond and warrant, by confession, and part of the sum for which the judgment was entered was costs, the court directed the clerk to inquire into the consideration of the bond, and require the attorney to produce proof of the consideration, or answer to interrogatories on oath; and the costs so included in the bond to be taxed, and to report thereon to the court, and all proceedings on the judgment, in the mean time, to be stayed, *ib.*
7. Attorneys and counsellors at law are not privileged from serving in the militia. *Case of Bliss*, 347
8. Though the common law privileges of the officers of the courts of justice cannot be taken away, by general words, yet they may by the express words, or manifest intent of a statute, *ib.*

See PRACTICE, 28.

AWARD.

1. Where a submission to arbitrators was general, of all actions, causes of actions, suits, &c., it was held, that parol evidence was inadmissible to show that the arbitrators awarded concerning a matter not in

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controversy between the parties, at the time of the submission. *De Long v. Stanton*, 38

2. Arbitrators are to decide *secundum allegata et probata*, and their decision on the point is final, *ib.*
3. On a general submission to *A.* and *B.*, arbitrators, of all actions, causes of actions, &c. the arbitrators awarded that *A.* should pay to *B.* two several sums of money, at certain periods, and if he should give to *B.* "good and sufficient security for the payment of the said sums of money," then *B.* should deliver up to *A.* the quiet and peaceable possession of a certain farm, on which *B.* then lived; but in case *A.* should neglect to give such security, then *B.* should be entitled to keep possession of the farm until the money was paid; it was held, that as the award did not define the nature and extent of the security to be given by *A.*, it was void for uncertainty. *Jackson, ex dem. Stanton, v. De Long*, 43
4. No action lies on the penalty of an arbitration bond, for the non-performance of an award, where the award is not made within the time specified in the condition of the bond; though the parties, by an agreement under their hands and seals, had enlarged the time for making the award, and the award was made within such enlarged time. The proper remedy is on the submission implied in the agreement to enlarge the time. *Freeman v. Adams*, 115
5. Where a cause is submitted to arbitration, without a rule of court, this court will not interfere to set aside the award. *Cranston and another v. Kenny's Executors*, 212
6. Nor, if the submission is made a rule of court, will the award be set aside, unless for corruption or misconduct of the arbitrators, *ib.*

B

BAIL.

1. When on a surrender and *committitur* of the defendant, by his bail, the plaintiff consented to an *exoneretur*, this was deemed a sufficient discharge, as it regarded the plaintiff; as the *exoneretur* might be entered by the bail, at any time, and pleaded. *Kellogg, Assignee, &c. v. Manro & Brown*, 300
2. Separate suits were brought by the endorsee of a promissory note against the maker and endorser. In the suit against the endorsee, *A.* became *special bail*. The plaintiff recovered judgments in both suits, in August, 1810, and a *f. fa.* was issued against the maker, which was returned in November, satisfied. A *ca. sa.* was issued against the endorser, which was returned *non est inventus* in January, 1811. In an action of debt on the recognisance, against the bail, the bail pleaded *payment*, and a set-off of the amount paid by the maker, as money received to his use. It was held, that the recognisance being forfeited, the matters pleaded by the bail could not be set up in bar to the suit on the recognisance, in which a judgment must be given for the penalty; but that the defendant might show the payment by the maker, in mitigation, so that the damages should be assessed for the costs only of the suit against the principal; or that judgment, *pro forma*, might be entered for the penalty, and execution taken out for those costs, as damages, and for the costs of the suit on the recognisance. *Wattles v. Laird*, 327
3. Where a defendant, after verdict, obtained leave to plead his discharge under the insolvent act, *pais darrein continuance*, on payment of costs, but neglected to comply with the condition of the rule, and judgment was perfected against him; it was held that he could not, afterwards, avail himself of his discharge; and the court would not, therefore, on motion of his bail, order an *exoneretur* on the bail piece. *Mechanics' Bank v. Hazard*, 312
4. If the debt in the suit against the principal has been paid, that is matter to be pleaded by the bail, and is not ground for his relief on motion, *ib.*

See PRACTICE, 1. 5. 6. 11.

BAILMENT.

1. A mere naked bailee of goods is not liable to an action for them, at the suit of the bailor, until after a demand and refusal of them. *Brown & Hotchkiss v. Cook*, 361

BASTARDY.

1. An action lies by the overseer of the poor, on an order of bastardy, to recover of the putative father the weekly sum directed by such order to be paid for the maintenance of the child. *Wallworth v. Mead and another*, 367
2. Such an order of bastardy, unless appealed from, is conclusive on the defendant. It is *prima facie* evidence of the plaintiff's demand, and it lies on the defendant to show its reversal or modification, by the sessions, or other matter in discharge, *ib.*

See COURT OF GENERAL SESSIONS.

BILL OF EXCEPTIONS.

1. Where on the return to an *alternative mandamus*, commanding the judges of a court of common pleas to sign and seal a bill of exceptions or show cause, &c. it appeared that the bill of exceptions was not tendered to the judges, at the trial, but was presented to them, individually, at different times, after the court had adjourned for the term, this court refused to grant a peremptory *mandamus*. *Midberry v. Collins & Mead*, 345
2. The facts on which a bill of exceptions is taken must be reduced to writing at the time, and presented distinctly to the court, during the trial, or, at least, during the continuance of the term, *ib.*

BOND.

1. In an action of debt on a bond against *A.*, *B.* and *C.* who were described with the addition or description of "trustees of the Baptist society of the town of *R.*" and who executed the bond with their individual names and seals, but with that addition, it was held that this was a mere description of persons, and that the defendants were liable in their individual capacity. *Taft v. Brewster and others*, 334

See SHERIFF, 2. 14, 15. PARTNERSHIP.

C

CAMBRIDGE PATENT.

1. To ascertain the true east line of the *Cambridge Patent*, the sixth course in that patent is to be run to the most westerly corner of the *Walloomsneck Patent*, ascertained by running two courses from the house of *Gerrit Cornelius Van Ness*; and the seventh course in the *Cambridge Patent* must be run from the terminating point of the sixth course, so ascertained, north, 1,092 chains, to the middle of the *Baltonkill, &c.* *Jackson, ex dem. Schomerhorn and others, v. Murch*, 318

CERTIORARI.

1. An execution was issued by a justice within 30 days after a judgment by him, and the same was levied on the goods of the defendant, and the constable took security for their forthcoming at a certain day; afterwards, before the day, and before the expiration of the 30 days, a *certiorari* was regularly issued and served on the justice. It was held that the *certiorari* did not operate as a stay of proceedings; the execution being levied before the allowance of the *certiorari*. *Blanchard v. Myers*, 68

See JUSTICES' COURT.

CHANCERY.

1. Where the chancellor committed one of the officers of the Court of Chancery, for malpractice and contempt, and a judge of the Supreme Court, in vacation, on a *habeas corpus*, discharged the prisoner, and the chancellor, afterwards, recommitted him for the same cause, it was held that the chancellor was not liable to an action at the suit of the officer, for the penalty given by the fifth section of the *habeas corpus* act. (*Sess. 24. c. 65.*) *Yates v. Lansing*, in error, 395
2. The Court of Chancery may, in its discretion, commit for a contempt, on the affidavits of witnesses only, without first putting the party to answer on interrogatories, *ib.*
3. A person who has been regularly committed by the chancellor for a contempt, and afterwards improperly set at large, may be recommitted by an order of the Court of Chancery, reciting the original writ or attachment, *ib.*
4. A judge of the Supreme Court has no power to dis-

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- charge a person, committed by order of a court of chancery for a contempt of that court, *ib.*
5. And where a judge, in vacation, on *habeas corpus*, discharged a person committed by the chancellor on a conviction for a contempt, and he was again re-committed for the same cause, such re-commitment was held legal, *ib.*
6. *It seems* that the Supreme Court cannot discharge, on *habeas corpus*, a person committed by the Court of Chancery for a contempt of the court, *ib.*
7. A court of equity will compel a vendor to a specific performance of a contract for the sale of land, for a part of the land, where he has incapacitated himself from conveying the whole. *Waters v. Travis*, in error, 450
8. Where land contracted to be sold was held in common, and the vendor, after the agreement, divided with the other tenants in common, and executed a deed in partition, this was held not to be an objection to a specific performance of the contract, on the part of the vendor, so far as he was capable of a performance, *ib.*
9. But there is a distinction, in regard to a specific performance of a contract of sale, between the case where the vendee seeks to compel the vendor to a specific performance, and where the vendor resorts to a court of equity to compel a specific performance on the part of the vendee, *ib.*
10. A conveyance for a valuable consideration, made *bona fide*, to a third person without notice of a previous contract of sale by the vendor, and before it has been carried into execution will transfer the legal title to such third person, *ib.*
11. Mere lapse of time is not, in all cases, an objection to decreeing a specific performance of an agreement, *ib.*
12. And where an agreement for the sale of land was suffered to remain unexecuted for fourteen years, the vendee having continued in possession, the Court of Chancery, under the circumstances of the case, decreed a specific performance of the contract. *Waters v. Travis*, in error, 450
13. Where on a bill in chancery for a specific performance of an agreement to convey land, the complainant alleged a payment of part of the purchase-money, under a verbal agreement prior to the written contract; and a feigned issue was awarded to try the fact as to the payment, and the jury found the fact, it was held that the defendant, having acquiesced in the feigned issue, and controverted the fact, at the trial, could not, afterwards, object to the decree allowing the payment in part of the purchase-money, *ib.*
14. The Court of Chancery has concurrent jurisdiction with the courts of law, in all matters of account. *Post & Russel v. Kimberly & Brace*, 470
15. The several acts of the legislature granting and securing to certain persons therein named the sole and exclusive right of navigating boats by steam, in the waters of this state, for a certain term of years, are constitutional and valid, and the party in possession of such rights is entitled to an injunction from chancery to restrain others from infringing that right; though the statute had declared that any boats, &c. used in violation of the right of the grantees should be forfeited to them, and an action of *detinue* had been brought by the grantees to recover the boats, &c. forfeited. *Livingston and Fulton v. Van Ingen and others*, 507
- See CONTEMPT, 2. COURT OF ERRORS, 1, 2, 3, 4.

COLLECTOR OF THE CUSTOMS.

See DUTIES. ASSUMPSIT.

CONSIDERATION.

See PROMISSORY NOTES, 7.

CONSOLIDATION.

See PRACTICE, 23, 24.

CONTEMPT.

1. A commitment for a contempt for an indefinite time, or "until the further order of the court," is good. *Yates v. Lansing*, in error, 395
2. Where a master in chancery was committed by an order of the court which stated, that *A. B.*, while he was master, filed a bill to which he subscribed the name of *C. D.*, one of the solicitors of the court, without his knowledge or consent, &c.

"contrary to the statute in such case made and provided, and in wilful violation of his duty as master, and in contempt of the court, and the said *A. B.* was ordered to be committed to gaol until the further order of the court." This was held to be a legal commitment for a contempt, the words "contrary to the statute," &c. being surplusage; and that a judge of the Supreme Court could not, on *habeas corpus*, discharge the person so committed, from his imprisonment. *Yates v. Lansing*, in error, 395

See CHANCERY, 1, 2, 3, 4, 5, 6.

CORPORATION.

1. The trustees of an incorporated religious society are, *virtute officii*, entitled to the possession of all the temporalities, and are considered as lawfully seized of the ground and buildings belonging to the church; and if the trustees close the door against the minister and congregation, and they break and enter the church, by force, an indictment at the instance of the trustees will lie against them, for such forcible entry. *The People v. Runkle*, 147
2. Where the trustees of a religious incorporation were required by statute to be divided into three classes, and the seats of one class were to be vacated at the end of every year, so that one third should be "annually chosen," and that the time of the annual election should be, at least, six days before the vacancies should happen; it was held that elections of trustees on *Pixter Monday*, (*Monday after Whitsunday*,) though a movable holiday and not a day certain, was valid, *ib.*
3. Where officers of a corporation are required to be annually elected, it seems, that they may continue in office, after the year, and until others are elected in their stead, *ib.*
4. An action lies against a stockholder of a turnpike corporation, on his promise in writing to pay for the shares for which he has subscribed, in instalments, notwithstanding the remedy given in the act, of a forfeiture of the shares and of all previous payments. *P. & D. & Company of the Goshen and Minisink Turnpike v. Hurin*, 217

SECOND. TOWN.

COSTS.

1. An action was brought in a court of common pleas, founded on matters of account between the parties, which was referred, by order of the court, and the referees, in their report, certified that the amount of the respective accounts of the parties proved before them, taken together, was 265 dollars and 26 cents, and that the balance due the plaintiff was 16 dollars and 74 cents, for which sum judgment was entered: It was held that the plaintiff was entitled to costs. *Dunham v. Chamberlain*, 294
2. In an action against a justice of the peace, for an act done in his official capacity, the defendant pleaded the general issue and a justification, and there was a replication to the second plea and a demurrer, on which judgment was given for the defendant. On the general issue, a judgment of *nonpross* was obtained for not proceeding to trial. It was held that the defendant was entitled to double costs on the *nonpross*, but not on the demurrer; and after double costs had been taxed on both issues, and part of the costs paid, and an execution issued for the residue, the court ordered a re-taxation at the expense of the plaintiff. *Wait v. Durand*, 254
3. Costs are the consequence of some default, and are not awarded at common law, or in the instance court, against an innocent party. *Clinton v. Strong*, 370
4. Where costs were exacted by the clerk of the District Court of the *United States*, as a condition of giving an order for the redelivery of property, seized by the collector of the customs, and by whom it had been liberated; it was held that the payment was not voluntary; and being exacted *colere officii*, might be recovered back, in an action of *indebitatus assumpsit*, at common law, *ib.*
5. Where a suit is discontinued for want of cause, without any decision of the court, the exaction of costs is an act *in pais*, and the money may be recovered back by suit against the officer exacting them, in any other court having competent jurisdiction, *ib.*

See COURT OF GENERAL SESSIONS

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COURTS OF RECORD.

A judge of a court of record is not liable to answer personally, in a civil suit, for any act done by him in his judicial capacity, nor for errors of judgment. *Yates v. Lansing*, in error, 395

See CHANCERY, 1.

COURT OF ERRORS.

1. If any of the parties in interest in a cause, become changed, by death or otherwise, pending an appeal to this court, the cause will be remanded, without prejudice to either party, in order that the court below may take the necessary steps to bring in the parties whose interests may have accrued since the appeal. *Wilson and others v. Hamilton and others*, 349
2. No appeal lies to this court from an order of the Court of Chancery, for an attachment to bring up a party to answer interrogatories for a contempt, in disobeying a writ of injunction issued in a cause. *Buel and others v. Street and others*, 443
3. It seems that no appeal lies from an interlocutory order of the Court of Chancery which does not involve a decision upon some matter touching the merits of the cause, and by which the party is aggrieved, *ib.*
4. Where an objection is made in the Court of Chancery, of a want of parties, it may be insisted on, in this court, on the appeal. *Grant and others v. Duns and others*, 591

COURT OF GENERAL SESSIONS OF THE PEACE.

On appeals in cases of bastardy, the general sessions of the peace have no power to award costs, unless authorized by statute; and no such authority existed under the act of the 6th of March, 1801; and the act of the 30th of March, 1810, (sess. 24. c. 109,) does not apply to appeals brought before the passing of the act. *Washburn v. Overseers of Hebron*, 119

COVENANT.

1. A., a lessee, bargained, sold and assigned the leasehold premises to B., "to have and to hold the same in as ample a manner, to all intents and purposes, as A. might or could hold and enjoy the same;" and covenanted that he had "good and lawful right to bargain and sell the premises as is above written," and that the same were free from all arrearages of rent and other encumbrances, &c. B. was afterwards evicted by a title paramount to that of the landlord: It was held that the covenant was qualified and limited to the acts of the defendant himself, and did not amount to a warranty of the landlord's title. *Knickerbocker v. Killmore*, 106
2. In an action of covenant, the plaintiff declared that the defendant covenanted to pay to the plaintiff 250 dollars in manner following, to wit, 125 dollars on the 20th of "May ensuing, and 125 dollars on the 20th of May, 1811, &c. and the breach assigned was, that "the said sum of 125 dollars was unpaid," &c. On demurrer, it was held that the breach was not well assigned, as it did not appear, with sufficient certainty, which of the two sums had not been paid. *Carpenter v. Alexander*, 291
3. A., by a covenant under his hand and seal, agreed to pay B. one dollar for every thousand feet of timber annexed to his name in a schedule annexed to the agreement, for the privilege of floating the timber down a certain stream and dam. In an action of covenant brought by B. against A., he pleaded *non est factum*, and it appeared that the schedule annexed to the agreement was subscribed "Delano & Burnam," and the name of the defendant subscribed to the agreement was Andrew Burnham. It was held that the defendant, having admitted by his covenant that his name was subscribed to the schedule, was estopped to deny that Delano & Burnam did not include his name, or to allege a misnomer, in avoidance of his covenant, the schedule being taken, in that respect, as part of the covenant. *Smith & Platt v. Burnham*, 306
4. In an action of covenant for a breach of the covenant of *seisin* in a deed, where the grantee had been in the actual enjoyment of the land, and taken the profits for 15 years, without any valid title from the grantor, it was held, that the grantee was en-

titled to recover the consideration money, and the interest thereon, for six years only, and the costs. *Caultkins and others v. Harris*, 394

5. In an action of covenant for a breach of the covenant for further assurance, contained in a deed, by which the grantor covenanted that he, and his heirs, &c. would, at any time, at the reasonable request of the grantee, and at the proper costs and charges of the grantor, make and execute all such further and other reasonable conveyances and assurances, &c. as by the grantee, his heirs, &c. or his or their counsel, &c. should be reasonably advised or required; it was held that, to entitle the plaintiff to bring his action, he should first have devised the further assurance, and given notice of it to the defendant, specifying the particular kind of assurance, or have tendered the assurance to the defendant and allowed him a reasonable time to consider of it, before bringing a suit, for such assurance must be reasonably devised, and not different, in its nature or purport, from the original bargain. *Miller v. Parsons*, 336

See MILITARY BOUNTY LANDS.

D

DEBAUCHING A DAUGHTER.

[See ACTION ON THE CASE.]

DEED.

1. If a person out of possession conveys land held adversely by another, the conveyance is void, so that the stranger cannot maintain an action upon it. *Jackson, ex dem. Lathrop and another, v. Demont*, 55
2. And it seems not to be material, as to the operation of the deed, that the knowledge of the adverse possession should be brought home to the parties; though it might be material, if either were prosecuted for the penalty given by the statute against selling pretended titles, *ib.*
3. Where a tenant in possession of land, claiming to hold adversely, after issue joined, in an action of ejectment against him, received a deed or release of the premises, from one of the lessors, it was held that admitting the sale so made to be an act of maintenance, (a point not decided,) yet the deed was effectual, as between the parties to it, and a bar to the lessor who executed it, *ib.*
4. And where such a deed was given in evidence at the trial, by consent of the parties, it was held, that though it ought regularly to have been pleaded *quia darrein continuance*, yet having been admitted by consent, it must have the same effect as if it had been duly pleaded, *ib.*
5. A proviso in a deed to A. dated in 1728, reserving to the inhabitants of the town of R. not being incorporated, the right to cut wood on the land conveyed, when not enclosed, &c. was held void: but if it were operative, it would only give the right to the inhabitants of the town who were living at the time of the grant, as the proviso contained no words of perpetuity. *Hornbeck v. Westbrook*, 73
6. A deed cannot be proved by the grantee, without accounting for the absence of the subscribing witness. *Willoughby v. Carleton*, 136
7. A. received a deed for land from T. in November, 1807, and, afterwards, in September, 1808, took a deed from B. the patentee, and true owner of the land, which was duly recorded in October, 1808. A previous deed had been given by B. to G. in September, 1807, which was not registered until April, 1811. It was held, that if a subsequent purchaser has notice, at the time of his purchase, of a prior unregistered deed of the same land, it is the same, as to him, as if such deed had been registered. *Jackson, ex dem. Bennell, v. Sharp*, 163.
8. And if the agent of such subsequent purchaser, at the time he makes the purchase, knows of the prior unregistered deed, it is the same as notice to his principal, *ib.*
9. Where a deed, executed in 1767, recited a power of attorney from six of the grantors, for the whole of a patent, and the lands in the patent were proved to be held generally, under and according to that deed; it was held, that after the lapse of forty-four years, the execution of the power of attorney would

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be presumed. *Jackson, ex dem. Clinton and others, v. Phelps,* 169

See PATENT.

DEVISE.

1. *A.* by his last will and testament, directed his executors to pay his debts, and to pay twenty-two pounds to his wife, &c., and gave legacies to his several children, by name, and ordered his executors to have his real and personal estate appraised, and if the amount of the sums bequeathed amounted to more than the value of his estate, the surplus was to be divided among the legatees in proportion; and if it amounted to less, a deduction was to be made, in like proportion: provided that his debts and funeral charges should be first paid; and he declared that "it was to be understood that each of the heirs and legatees named were to receive their several sums out of his estate in lands, goods, and chattels, which he left at his decease;" and his two sons and legatees were appointed executors. It was held, that there was no devise of the real estate; that the executors, at most, had a power to sell the lands; and if so, the estate, in the mean time, and until it was sold, descended to the heirs at law. *Jackson, ex dem. Hall and others, v. Burr,* 104

2. Where *A.*, being seised in fee of lands, devised to *D.*, among other things, as follows: "I give and bequeath unto my eldest son *Daniel*, all that part of a lot of land that I now live on, northward," &c.; and after devises and legacies to other sons and his daughters, he devised to his third son, as follows: "I give and bequeath unto my third son, *Jeremiah*, and to his heirs and assigns, for ever, all the rest of my estate, both movable and immovable, of every kind, not disposed of," &c. "he paying all my just debts and the said legacies, &c.; and if he should refuse or neglect to pay all my just debts, &c., then my will is, that my executors sell so much of that part of my estate, given to him, as shall pay," &c. It was held, that *Daniel* took only a life estate in the lot devised to him, and that *Jeremiah*, under the devise to him of the residue of the testator's estate, took the remainder in fee, after the determination of such life estate. *Jackson, ex dem. Wells, v. Wells,* 229

3. A devise of lands will not pass lands acquired subsequently to the execution and publication of the will. *Jackson, ex dem. Rogers and others, v. Potter,* 312

4. A republication of a will, so as to affect after acquired lands, must be made with the same solemnities as the original will, *id.*

5. Where a person made a will, in 1805, devising all his estate, and afterwards became seised of the lands, and in his last sickness, in 1810, declared that he had made a disposition of all his estate by a will which he had deposited with *S.* and that he did not wish to alter it, except to add another executor; this was held not to amount to a republication of the will, so as to pass the after acquired land, *id.*

DISCONTINUANCE.

See PRACTICE, 4.

DOWER.

1. The admeasurers of dower, appointed under the act, (sess. 29. c. 168,) are not to do execution, but are, like commissioners, to set off one third in value of the estate, so as to prevent all difficulty or contention between the widow and heir or tenant, as to the just extent or ascertainment of dower; and it seems that notice of the time of admeasurement is not requisite; but where the admeasurers met at the house of the heir, and requested him to show the premises, which he refused, saying he would have nothing to do with the business, that was held a sufficient notice, in the first instance, and a waiver of all further notice. *In the matter of Watkins,* 245

2. In an action of dower, the defendant pleaded, 1. *Non est seisin*, &c. 2. *Non est assumpsit*, &c. 3. That the husband of the demandant was in life, &c. It was held, that the defendant claiming to hold under the heirs of the husband of the demandant, was estopped from denying his seisin and death, and that the defendant could not, at the trial, give

in evidence, under the above pleas, a release of the premises to *A.* executed by the demandant, but that such release must be pleaded. *Hitchcock v. Carpenter,* 244

DUTIES.

A Spanish ship bound from Havana de Cuba to London, having met with a violent gale of wind, put into the port of New-York, and was entered at the custom-house as a ship in distress; having conformed to the regulations of the act of congress (cong. 5. sess. 3. c. 123. s. 60) in such cases; she was condemned, after a regular survey, by the wardens of the port, as unfit to be repaired, and under their direction, was sold at public auction, and purchased by American citizens, who, at their own expense, repaired her and fitted her out on a voyage to Cadiz; but the collector of the port refused to give her a clearance, unless the new owners would first pay the tonnage duty or light money, of 50 cents per ton, imposed on all foreign ships entering the ports of the United States. The owners objected to the demand as illegal; but paid the money, and afterwards brought an action of assumpsit against the collector to recover it back. Before the suit was commenced, the money had been paid by the collector into the United States Bank, to the order of the treasurer of the United States; no notice, previous to the action, having been given to him not to pay the money over. It was held, that no tonnage duty or light money was due, in this case; and, at any rate, it was wrongfully demanded of the plaintiffs, who, having paid it compulsively, were entitled to recover it back from the collector, without showing a notice to him not to pay it over; especially, as there was no other person against whom the plaintiffs could bring their action. *Ripley and others v. Galton,* 301

E

EJECTMENT.

1. In an action of ejectment the court cannot compel the defendant to consent to a survey of the premises in his possession. *Jackson, ex dem. Van Rensselaer, v. Hogeboom,* 63
2. The question of adverse possession ought to be left to the jury; and the judge having directed the jury as to that fact, a new trial was granted. *Jackson, ex dem. Jackson, v. Jay,* 102
3. *A.* entered into possession of land, without title, and afterwards entered into a contract with *T.* who covenanted to give him a deed for the land. *A.* assigned the contract to *S.* who took possession, and afterwards received a deed from *T.* in November, 1806, and, afterwards, a deed from *B.* the patentee, and true owner, in September, 1808. It was held, that the original possession of *A.* being without title, was to be deemed the possession of *B.* the patentee, and that the possession of *S.* under the contract from *T.* to *A.* was not adverse. *Jackson, ex dem. Bunnell, v. Sharp,* 163
4. The doctrine of adverse possession is to be taken strictly; and the fact must be made out by clear and positive proof, and not by inference. Every presumption is in favor of a possession in subordination to the title of the true owner, *id.*
5. To constitute an adverse possession, it is not necessary that there should be a rightful title. It must, however, be a possession, under color and claim of title, and exclusively of any other right. *Smith, ex dem. Teller and others, v. Burtas and another,* 174
6. If *B.* enters, claiming as a tenant in common under the same title as that of the lessor, it admits the title of the lessor, so that neither *B.* nor those claiming under him, can set up such entry as adverse to the common title, or injurious to the rights of the other tenants in common, *id.*
7. In an action of ejectment, the plaintiff, after relying on the possession, and a descent cast, offered to prove a seisin in fee of 25-32 parts of the premises; and it being supposed unnecessary to show a paper title, as the defendant relied solely on an adverse possession of 99 years, the plaintiff offered to show that *B.*, whose possession was relied on, entered claiming to be tenant in common, under the same title: It was held, that this evidence was admissible, without requiring the plaintiff, at the same

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time, to admit the fact that B. was a tenant in common with him. *Smith, ex dem. Teller and others, v. Bartis and another,* 174

8. Where the lessor of the plaintiff, in an action of ejectment, went as for a vacant possession, and obtained a regular judgment, by default, it was set aside, and the person claiming to be owner of the land, on an affidavit of merits, &c. was admitted as defendant, on payment of costs. *Wood, ex dem. Elmendorf v. Wood,* 257

9. A. gave a lease of a farm described by certain notes and bounds, to contain 75 acres. In an action of ejectment, brought by A. against B. to recover a parcel of land, beyond the 75 acres, and which the lessee claimed to hold as within the boundaries set forth in the lease; it was held, that as A. had received rent for the farm from B. he must be considered as a tenant from year to year of the premises in dispute, and, therefore, entitled to a notice to quit. *Jackson, ex dem. Livingston v. Wilsey,* 267

10. A. died seized of land, leaving three sons, B., C. and D. In an action of ejectment by the heirs of B. against E. who claimed to hold under D., E. offered in evidence the will of A. dated in 1757, by which he devised his real estate to his three sons, and their heirs, in equal proportions; but the will being objected to as void, on account of the insanity of the testator, it was waived by E. who relied on a parol partition of the testator's estate between the three sons, in 1786, a previous holding as tenants in common, and a separate possession under the partition by D. continued from that time. It was held, that though when a tenancy in common is admitted, a parol partition, followed by possession under it, will be valid; yet where the whole right or title of the party setting up the tenancy in common and parol partition is denied, a parol partition, and possession under it, will not be sufficient to transfer the title: and that by waiving the will of A. the title was in B. as heir at law, and could not be devested by parol. *Jackson, ex dem. Van Buren v. Veeburgh,* 270

11. And though after a possession by D. for so long a time, a tenancy in common might have been presumed; yet by offering the will of A. and then waiving it, the presumption of any other source of title was excluded, 270

12. Where a grantor, in his deed, reserved to himself, his heirs and assigns, for ever, "the right and privilege of erecting a mill-dam at a certain place described, and to occupy and possess the premises without any hindrance or molestation from the grantee or his heirs," &c. It was held, that the right reserved was such an interest in the land, that an action of ejectment would lie for it. *Jackson, ex dem. Leuz and others, v. Buel,* 298

13. Wherever a right of entry on land exists, and the interest is tangible, so that possession of it can be delivered, an action of ejectment will lie for it, 298

14. A. agreed to convey land to B. on B.'s paying 100 dollars at the time of taking possession, and the residue of the purchase-money at future periods, specified in the agreement. B. took possession on the 15th April, 1811, and at the same time paid the 100 dollars to A. In an action of ejectment, brought on the demise of A., against B., to recover the possession of the premises, it was held, that B. was entitled to a notice to quit, previous to bringing the action. *Jackson, ex dem. Osterander, v. Rosen,* 330

See DEED, 1, 2, 3, 4. EXECUTION, 6. ADVERSE POSSESSION.

EMBLEMENTS.

See LEASE.

ENTRY ON LAND.

An agreement for the purchase of land does not, of itself, amount to a license to the party agreeing to purchase, to enter on the land; nor does a license to enter imply a permission to cut and consume the timber. *Bagan v. Townsend,* 36

See AGREEMENT, 2.

EQUITY OF REDEMPTION.

See MORTGAGE, 2, 3.

ESCAPE.

See JUSTICE'S COURT, 10. SHERIFF.

EVIDENCE.

1. Where a submission to arbitration was general, of all actions, causes of actions, &c. it was held that parol evidence was inadmissible to show that the arbitrators awarded concerning a matter not in controversy between the parties at the time of the submission. *Delong v. Stanton,* 38
2. A deed cannot be proved by the grantee, without accounting for the absence of the subscribing witness. *Willoughby v. Carleton,* 136
3. On the issue of *null tiel record*, the record of a judgment was produced, to rebut which the plaintiff produced a rule of the court subsequent to the judgment, setting it aside for irregularity. It was held that the entry of the rule in the minutes of the court, could not be received as evidence against the record. *Cresswell v. Byrnes,* 387

See DEED, 4. 9. TRESPASS, 3. ATTORNEY WITNESS. EJECTMENT, 7

EXCLUSIVE PRIVILEGE.

See CHANCERY, 5. INJUNCTION.

EXECUTION.

1. Bank shares, or shares in a public library, being mere choses in action, cannot be seized and sold under an execution. *Denton and others v. Livingston,* 96
2. Where A. leased a farm to B. on shares, and it was agreed that either party might put an end to the lease, giving six months' notice; but that if A. gave B. notice to quit, he was to pay B. for preparing the ground, or any extra labor; and B. sowed the ground with wheat, &c. in the autumn of 1808, and in February, 1809, A. gave notice to B. to quit, who immediately left the farm; it was held that a sale of all the right, &c. of B. to the wheat, &c. by the sheriff, in virtue of an execution against the goods and chattels of B. which he had seized, in January, 1809, was valid, and transferred the property in the whole crop to the purchaser, who had a right to enter, reap and carry away the crop, when ripe; and might maintain *trespass quare clausum fregit* against A. who had entered and turned him out while gathering the crop. *Stewart, jun. v. Doughty,* 100

3. A *f. fa.* was issued the 14th April, 1810, against A. and was delivered to the sheriff. In April, 1811, B. purchased a cow of A. *bona fide*, without any intent to defeat the execution which lay dormant in the sheriff's hands, until the 25th May, 1811, when he seized and sold the cow so purchased by B. It was held, that there being no evidence of any actual levy by the sheriff on the goods and chattels of A. the sale to B. was valid, and not liable to be defeated by the execution. *Bliss v. Bell,* 139

4. Where a *ca. sa.* against a sheriff was delivered to the coroner, who being indebted to the sheriff, gave him a receipt in full for the debt and costs in the execution, and engaged to settle the amount with the plaintiff, but failed to do so: it was held, that if the coroner was authorized to receive the debt in money, on the *ca. sa.* yet it must be an actual and absolute payment of so much cash to him, for the plaintiff; and that such an agreement between the coroner and sheriff was no payment or satisfaction of the debt. *Codwise v. Field,* 263

5. An execution returnable out of term is not void, but may be amended. *Cramer v. Van Alstyne,* 386

6. A writ of *habere facias poss.* was issued on a judgment in ejectment, returnable in February, 1811, which was executed, but never returned. In May, 1812, the plaintiff issued another writ of *hab. fac. poss.* on the same judgment, the tenant having, in the mean time, retaken possession of the premises. It was held that though a year and a day had intervened between the term at which the first writ was returnable and the issuing of the second, no *scire facias* was requisite to revive the judgment, as the court would presume that the first execution was continued down on the roll to the time of issuing the second, which may be done at any time, being matter only of technical form. *Jackson, ex dem. Thompson, v. Stiles,* 391

See SHERIFF, 3, 4, 5. CREDITORS. FRAUD, 3, 4. LEASE JUSTICE'S COURT, 15.

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P

FENCES AND FENCE VIEWERS.

1. The decision of fence viewers, as to the proportion of fence of each party, is not requisite, if there is no dispute between them as to their proportion; nor are the fence viewers to settle the costs and expenses of preparing the fence. *Willoughby v. Carleton*, 136
2. Parol evidence of a written notice to repair is sufficient, *ib.*

FORCEFUL ENTRY AND DETAINER.

1. An indictment for a forcible entry will lie at the instance of the trustees of an incorporated religious society, against the minister and the congregation, for entering the church, by force, after it had been shut up by the trustees. *The People v. Runkle*, 147
2. In an indictment for a forcible entry, &c. it is enough, if the complainants or party injured, and the injury, are stated with sufficient certainty to enable the court to ascertain the injury and award restitution; and any variance, not essential, in the description of a corporation, will not vitiate the proceedings, *ib.*

FOREIGN JUDGMENT.

See PLEADING, 2.

FRAUD AND FRAUDULENT CONVEYANCES.

1. Where the parties do not stand in the relation of debtor and creditor, and the object is not to defeat creditors, goods may be left in the hands of the original owner, without its being considered fraudulent. *M'Intyre v. Tanner*, 135
2. The mere possession of a personal chattel, with the consent of the true owner, will not render the chattel liable to the debts or disposition of the reputed owner; but there must be a fraudulent or deceptive purpose in view, or implied from the special circumstances of the case. *Craig v. Werd*, 197
3. Where A. purchased a livery stable, &c. and delivered the possession to B., who carried on the business in his own name, but was to pay over all the moneys he received to A. who was to allow B. one third of the net proceeds, or clear profits, and A. afterwards brought a coach, which he delivered to B. and which, afterwards, while in the possession of B. was taken in execution by a creditor of B., it was held, that the property in the coach did not pass to B. and unless his possession of it was fraudulent, and intended for colorable purposes, it was not liable to his creditors, *ib.*
4. A judgment was confessed, without process, by B. in favor of A. before a justice, and execution taken out immediately by consent, and delivered to a constable; and before any levy made, C. gave the constable a receipt for the household goods, &c. of B. and the goods were, afterwards, by consent of B., sold in mass by the constable, without seeing the goods, and after the execution had expired. A. became the purchaser; and the goods were left in the possession of B., and C. gave a receipt to A. to account for them; and while the goods were thus in the possession of B. they were taken by another execution against him, at the suit of D. In an action of trover, brought by C. for the goods, it was held that the transaction between A., B. and C. was fraudulent, and that C. had no property in the goods, which were liable to the second execution. *Burnell v. Johnson*, 243
5. A. by a regular bill of sale, sold to B. certain articles, being tools of his trade, for the consideration of a sum of money, paid by B. to A.: "and also, in consideration that A. was to have the use and occupation of the tools," &c. (which were specified in the bill of sale,) "for the term of three months from the date." (The 29th Aug. 1810.) A judgment was obtained by C. against A. the 2d August, 1810, on which a *f. fa.* was issued and delivered to the sheriff on the 26th November, 1810, and the sheriff took the articles, then being in the actual possession of A. and sold them to satisfy the execution of C.:

It was held that the sale of the goods by A. to B. unaccompanied with the actual delivery of them,

was fraudulent and void as against C. a judgment creditor. *Sturtevant & Keap v. Ballard*, 337

6. A voluntary sale of chattels, with an agreement contained in the deed, or out of it, that the vendor may keep possession, is, except in special cases, and for special reasons, to be shown and approved of by the court, fraudulent and void, as against creditors, *ib.*
7. Fraud is a question of law, especially where there is no dispute about the facts. It is the judgment of law on facts and intents, *ib.*

FREIGHT.

1. the master of a vessel called the *Urania*, lying at Amsterdam, for 1750 guilders, paid in advance by B. contracted for his passage on board of the *Urania*, from Amsterdam to Batavia. The vessel put into New-York, in distress, and the owner repaired her and sent her on a different voyage, but offered B. a passage in another vessel, which was ready to sail from New-York to Batavia, and was a larger and more commodious ship. B., though he did not accept the offer, did not object to the change of the ship, but said he had business to transact in Philadelphia, and could not proceed immediately to Batavia. In an action brought by B. to recover back the money so paid to A. it was held that he was not entitled to recover back any part of it, it being his own act that he did not pursue the voyage to Batavia, the vessel in which he set sail having deviated from her direct course through necessity, and the providing diet and accommodations for this passage, entering especially into the consideration of the advance of the passage-money for the voyage, part of which had actually been performed. *Des-touches v. Peck*, 219

G

GAOL LIBERTIES.

See SHERIFF, 1, 2, 12, 13, 14.

H

HABEAS CORPUS.

1. The allowance of a writ of *habeas corpus* in term time, is matter of sound legal discretion. In the matter of *Ferguson, a United States' Soldier*, 239
2. Where it appeared, on application for the allowance of a writ of *habeas corpus* in term, that the party was a soldier in the army of the United States, enlisted by one of the officers of the United States, this court refused to allow the writ, it being a matter arising under or by color of the authority of the United States, and a judge of the Supreme Court of the United States, or the District Court of the United States, having clear and unquestionable jurisdiction in the matter, and could afford the party requisite relief, *ib.*
3. Whether the State Court has jurisdiction to allow a *habeas corpus* in such a case? *Dubitatur*, *ib.*

See CHANCERY, 1, 2, 5, 6. CONTEMPT, 2.

HIGHWAY.

1. On complaint made in writing to a justice of the peace, by an overseer of highways, pursuant to a warrant issued by the commissioners of highways, under the act, (sess. 24. c. 186,) stating that A. named in the warrant, had been warned to work on the highway, but had refused or neglected to do so; and the justice issued his warrant to one of the constables of the town, commanding him to levy of the goods and chattels of A. the penalty prescribed by the act for such refusal; and the constable, by virtue of the warrant, took and sold the cow of A. It was held, that admitting A. not to be liable to be assessed to work on the highway, yet no action would lie against the justice or constable, who are mere ministerial officers, having no judicial or discretionary power under the act, and therefore, not responsible for issuing process directed by the authority of persons having jurisdiction over the subject matter. *Beach and Saunders v. Furmen*, 229
2. The remedy of the party aggrieved in such case, is either by an action against the overseer, or by re-

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- moving the proceedings by *certiorari*, into this court, where they may be quashed, *ib.*
3. Whether a *female*, though a *freeholder*, is liable to be assessed to work on the public highway? *Quere, ib.*
4. The penalty given by the 19th section of the act regulating highways, (*sess.* 24. c. 186,) for obstructing highways, or roads, relates only to obstructions of highways, or public roads, and not to a private road. *Fowler v. Lansing,* 349
5. To bring a person in default, for not obeying the order of the commissioners of highways, and render him liable to the penalties, under the act to regulate highways, (*sess.* 24. c. 186,) for an encroachment on the highway, it is necessary that the commissioners should meet, deliberate and decide on the alleged encroachments, and give notice to the party to remove his fence in 60 days, which notice ought to state specially the breadth of the road originally intended, the extent of the encroachment, and the place or places where, so that the party may know how to obey the order for the removal of his fence. *Spicer v. Slade,* 359
6. In an action before a justice, for the penalty for obstructing a highway, under the act, a plea of title is not valid, unless reduced to writing: and it is sufficient, if the plaintiff produces the record of the establishment of the road as a highway, without showing all the proceedings preliminary to the laying out of the road. *Sage v. Barnes,* 365

HOSICK PATENT.

Bleeker's map of the *Hosick Patent*, made in 1754, is not conclusive where it differs from the actual survey or field-book made by him. *Jackson, ex dem. Judwin, v. Joy,* 100

I

INDICTMENT.

Lying in wait near a gaol, by agreement with a prisoner, and carrying him away, is not an offence against the statute, (*sess.* 24. c. 58. s. 12, 13,) but is a misdemeanor at common law. *People v. Tompkins,* 70

INDIANS.

See STOCKBRIDGE INDIANS.

INFANCY.

1. Infancy may be given in evidence under the general issue. *Wailing v. Tell,* 141
2. An infant, living with his father, is not liable, even for necessities, *ib.*
3. If infancy be assigned as an error in fact, and the defendant pleads in *nullo est errorum*, he admits the fact. *Bliss v. Rice,* 150

INJUNCTION.

Where an act of the legislature granted and secured to certain persons the sole and exclusive right of navigating boats by steam, in the waters of the state, for a certain term of years, the party in possession of such right was held entitled to an injunction to restrain others from infringing his right; though the statute declared that any boat used by others, in violation of the right of the grantees, should be forfeited to them, and an action of *detinue* had been brought, by virtue of the act, to recover boats so forfeited to the grantees. *Livingston and Fulton v. Van Ingen and others,* 507

INSOLVENT DEBTOR.

1. A discharge under the insolvent act is no bar to an action on an express covenant to pay rent, brought to recover rent accruing subsequent to the insolvent's discharge. *Lansing v. Prendergast,* 127
2. The act relative to insolvent debtors and their creditors, passed the 3d April, 1811, (*sess.* 34. c. 132,) does not extend to actions for libels or torts. *Strong v. White,* 161
3. The validity of a certificate of discharge under the insolvent act, will not be tried by affidavit, on motion; but the plaintiff must resort to his plea. *Noble v. Johnson,* 259
4. At a meeting of the creditors of K. an insolvent debtor, C., one of the creditors, refused to subscribe the petition for his discharge, unless he was first

paid or secured the sum of 50 dollars, part of his demand; and B. gave his promissory note to C. for 50 dollars, who thereupon signed the balance of the debt due him from K. In an action brought by C. against B. on this promissory note, it was held that the note was absolutely void, as being against the policy, and in fraud of the insolvent act; and that evidence to show that K. had paid or indemnified B. for the amount of the note, was inadmissible. *Yeomans v. Chatterton,* 248

5. Where a defendant, after verdict, obtained leave to plead his discharge under the insolvent act, *pais darrera continuance*, on payment of costs, but neglected to comply with the condition of the rule, and judgment was perfected against him; it was held, that he could not, afterwards, avail himself of his discharge. *Mechanics' Bank v. Hazard,* 392

See PLEADING, 3, 4, 5.

INSURANCE.

1. Policy of insurance on goods from New-York to Tonnagen, "warranted not to abandon, if detained or captured, until six months after notice, unless previously condemned, nor if refused admittance or turned away, but may proceed to another open port."

During the voyage the vessel was boarded by British cruisers, who, after examining the papers, allowed her to proceed. She was afterwards captured, on the 31st of March, by a French privateer and carried into Calais. The vessel and cargo were libelled in the Council of Prizes at Paris. The master was advised by counsel, by the American consul and agent of prizes, and by the American minister, that the property would certainly be condemned under the Berlin and Milan decrees, and that he ought to attempt a compromise with the captors. The master made a compromise, and on being paid about one fourth of the value of the vessel and cargo, abandoned them to the captors.

The insured received advice of the capture on the 26th of May, and gave immediate notice thereof to the insurers, and on the 26th November, made an abandonment for a total loss.

The compromise was made the 26th July, by the master, who was also part owner of the ship; and he acted *bona fide* for the benefit of all concerned, but without any express authority, and his acts were not adopted or ratified by the insured.

It was held, that the master was, from necessity, the agent of both parties, and his acts could not prejudice either; that the capture created a valid cause of abandonment; that the written clause merely suspended the exercise of the right for six months, or until condemnation, and, at the expiration of that time, the abandonment being duly made had relation back to, and took effect from, the capture, as a technical total loss. *Clarkson and others v. The Phoenix Insurance Company,* 1

2. If a ship, in a case of extremity, be voluntarily run ashore, and is afterwards recovered and performs her voyage, the damages resulting from the stranding are to be borne as general average. *Bradhurst & Field v. The Columbian Insurance Company,* 9
3. But if, by the act of running her ashore, the ship is destroyed and totally lost, but the cargo saved, this is not a case of general average, and the cargo is not bound to contribute, *ib.*
4. Insurance "on freight, from New-York to Bremen, with liberty to touch at Amsterdam, Rotterdam and Tonnagen, for a market, warranted free from seizure in port." The ship having sprung a leak, the master, without any intention of going to Amsterdam, but from necessity, put into the Texel, where the ship was repaired, but was detained by an embargo, and ordered to Amsterdam. During this detention a small part of the cargo, (a quantity of Peruvian bark,) by order of the government, and against the will of the master, was delivered, and the freight paid. The embargo being taken off, the ship with the rest of the cargo returned to the Texel, for the purpose of pursuing her voyage to Bremen, but was further detained under a general regulation of the government, for four days, at the Texel, and while so detained, a violent storm arose, and for greater safety, and with the advice of the officers and crew, the cables were cut, and the ship run on shore, in consequence of which she was so much injured as not to be worth repairing, if got

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- off, which was deemed impracticable. The cargo having been discharged on board of lighters, was seized and detained by order of the government, and carried to *Amsterdam*, and there put into the king's stores. The cargo was not consigned to any particular place or person; but was to be delivered to the order of the shippers: and both ship and cargo were placed under the direction of the supercargo, (a part owner and one of the insured,) as to the destination of the ship and the management of the cargo. It was held, that to entitle the insured to freight, there must have been either a delivery of the cargo at *Bremen*, or a voluntary acceptance of it at the *Tenal* or *Amsterdam*, by the consignee or supercargo, or a refusal by him, upon an offer made to carry on the goods in another vessel. *Bradhurst & Field v. The Columbian Insurance Company*, 9
5. If the master or ship-owner neglects to forward the goods, in such a case, by another vessel, when he has the power to do so, in consequence of which the freight is lost, the insurer is not liable, *ib.*
 6. And it is incumbent on the insured to show that the master was prevented by some other cause than the seizure of the goods, from carrying the goods to *Bremen*; otherwise, the omission to carry them, will be imputed to the seizure, as the apparent and proximate cause, *ib.*
 7. In an action on a policy of insurance on goods on board the same ship, for the same voyage, "against the dangers of the seas only," and, "in case of capture or detention, the risk to continue during and after such capture and detention;" it was held that there was no acceptance of the cargo at *Amsterdam* or the *Tenal*, by the supercargo or agent of the shippers, and that the loss of the voyage was occasioned, not by the perils of the sea, but the seizure, which prevented the cargo being sent to its port of destination in another vessel; the presumption being, from the circumstances of the case, and no evidence to the contrary being shown by the insured, that had it not been for the seizure, another vessel might have been procured to carry on the cargo to *Bremen*. *Schieffelin v. New-York Insurance Company*, 21
 8. It is the duty of the master, when the ship becomes disabled, during the voyage, to procure another vessel, if it is in his power; and the insurer is not answerable for the consequence of his voluntary neglect to do so, unless such neglect is caused by an act of *barratry*, *ib.*
 9. It is a general rule in such a case that the plaintiff, in an action on the policy, to entitle himself to recover on the ground of a loss of voyage, must show that another vessel could not be obtained, *ib.*
 10. Insurance on goods from *Guadeloupe* to *New-York*. The vessel was captured by a *British* cruiser and carried into *Antigua* and libelled in the Admiralty Court there. The master put in a claim, and the goods were detained for further proof, but were delivered to the master on his giving security for their appraised value and paying the costs. The master procured *A.*, a merchant in *Antigua*, to give the requisite security, and also to pay the costs, and other expenses for the ship and cargo; and for the indemnity of *A.* the master drew bills of exchange on his owner in *New-York*, and pledged the ship and goods to *A.* to secure the amount, which included a commission of 5 per cent. charged by *A.* on the sums advanced by him and the premium of insurance paid by him to insure the ship and cargo, so pledged, from *Antigua* to *New-York*. The cargo was delivered to the agent of *A.* at *New-York*, and the insured, in order to obtain possession of his property, paid his proportion of the charges and expenses, including the commissions and premium of insurance; it was held that the master having acted with good faith, and the charges being reasonable and necessary, the insured were entitled to recover of the insurers the amount so paid. *Fontaine v. The Columbian Insurance Company*, 29
 11. In case of necessity, the master may sell a part or hypothecate the whole of the cargo, for the necessary repairs of the ship, but he cannot mortgage or hypothecate the ship for the benefit of the cargo, *ib.*
 12. A vessel insured from *Charleston* to *New-York*, was, during the voyage, stranded and lost on *Little Egg-Harbor Beach*, on *Monday*, the 26th of *March*, at 2, A. M., about 90 miles from *New-York*. The insurance was effected by *A.* and *B.*, part owners, for themselves and the other part owners, of which the master was one, on the 4th of *April* following; but neither *A.* nor *B.* knew any thing of the loss until after the insurance was effected. The master was so much hurt at the time of the stranding, as to be unable to attend to business for 2 or 3 days; but he made immediate inquiry after the means of communicating information of the loss to *New-York*, and found that the only conveyance by land, was the mail from a place about 10 miles distant from the wreck, and which went only once a week, and had previously left the place, on the evening of the 26th, and would not leave it again until the *Monday* following. Several vessels lay near the place, bound for *New-York*, but detained by contrary winds. The master having put the cargo which had been saved on board of three small vessels, embarked on board one of them, on *Saturday*, the 31st of *March*, but on account of contrary winds, did not arrive at *New-York* until the 11th of *April*. With a fair wind, a vessel might reach *New-York* in one day; it was held that there was no actual fraud, and that the master not knowing of the intention to effect insurance, was bound to use no more than ordinary diligence, and that, under the circumstances of the case, there was not such gross negligence or constructive fraud, as could vacate the policy. *Andrews and another v. The Marine Insurance Company*, 32
 13. The cargo and freight of a vessel were separately insured by different underwriters, from *Bordeaux* to *New-York*. The vessel having performed 18-19ths of her voyage, was captured on the 23d of *October*, 1806, and carried into *Halifax*, where the vessel and cargo were libelled in the Vice-admiralty Court, as prize, and further proof ordered. *A.*, a merchant at *Halifax*, obtained an appraisal of them, and became security, by bond, to answer the amount; and the property was thereupon delivered to him. He took new bills of lading for the cargo, in his own name, and shipped it, in the same vessel, consigned to *B.*, his own agent in *New-York*, with directions to deliver it to *C.*, the owner, on his indemnifying *A.* for his bond, and all expenses, which *C.* refused to do. In *February*, 1807, the cargo and freight were abandoned to both underwriters, who paid a total loss, the 21st of *June*, 1807. On producing further proof, the vessel and cargo were liberated on the 1st of *April*, 1807. The vessel, on her voyage from *Halifax* to *New-York* was stranded and lost, but the cargo was saved and delivered to the consignee at *New-York*, who sold it at auction, and paid the net proceeds, after deducting all expenses at *Halifax*, &c. to the insurers on the cargo. In an action brought by the insurers on the freight against the insurers on the cargo, it was held, that no *pro rata* freight was due, the act of *A.* at *Halifax*, in receiving the cargo, being an act of necessity, done by a stranger, for the benefit of all concerned; and there must be a voluntary and unconditional acceptance by the owner, at the intermediate port, to form the basis of a new contract to pay ratable freight. *Marine Insurance Company v. United Insurance Company*, 188
 14. The acceptance of the net proceeds of the cargo, by the insurers, after an abandonment, forms no ground for a claim of freight against them; the insurers on the cargo have nothing to do with the freight, *ib.*
 15. Where the insured claimed for a total loss of a vessel, and 30 days previous to the commencement of a suit, exhibited the protest of the captain to prove the loss, but not the register or other proof of interest, to the insurer, who made no objection to the sufficiency of the proof, but refused to pay solely on the ground of a deviation, it was held, that this was an admission of the plaintiff's interest, or, at least, a waiver of the necessity of producing proof of it. *Ves & Lightbourns v. Robinson*, 192
 16. A vessel was insured "at and from *Port Plata*, *St. Domingo*, to *New-York*," and in going from *Port Plata* to *Sagua*, which is in the district bearing the name of *Port Plata*, and about 18 miles east of the port, in order to take in a cargo of mahogany, she was driven into the road or bay of *Isabella*, in the same district, and there lost. She had a permit from the custom-house at *Port Plata*, to go to *Sagua*, to obtain her cargo, and would have been obliged to

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return to *Port Plata* to pay the duties, and obtain a clearance, such being the usual course of the trade there. The custom-house and port of entry are confined to the particular place called *Port Plata*, and the *district*, for the purpose of revenue, which bears that name, extends nearly a hundred miles along the coast of *St. Domingo*. *Port Plata* is a safe harbor, but *Susua* and *Isabella* are open roads, and dangerous while particular winds prevail. It was held, that *Port Plata* proper, and the *district* of *Port Plata* were different objects, and the perils distinct; and that going from *Port Plata* to *Susua* was a deviation; and nothing but a clear, well settled and well understood usage of trade would be sufficient to include both objects under the simple name of *Port Plata*, *ib.*

17. A policy of insurance contained a clause that the insurers took no risk of blockaded ports. It was held, that if there was a blockade in fact, whether the capture on that account was legal and just, or not, it came within the exception in the policy, of the risks of blockaded ports. *Redcliff v. United Insurance Company*, 277

18. Where the sentence of condemnation is directly on the ground of a breach of blockade *de facto*, it is *prima facie* evidence of the fact of such blockade; and it is not enough that the jury have doubts, as to the existence of the blockade at the time of the capture, to authorize them to find a verdict for the plaintiff. *St. Lucar* was, in fact, blockaded on the 27th January, 1806, *ib.*

INTEREST.

Interest is recoverable against a person intrusted with the collection of money, who retains and converts it to his own use, from the time when the same ought to have been paid over. *People v. Gaskerie*, 71

J

JUSTICE'S COURT.

1. Under the 4th section of the act, (*sess.* 31. c. 204,) "for the recovery of debts to the value of 25 dollars," a justice cannot issue a warrant against a freeholder or person having a family, on the oath of the plaintiff, but the proof of the defendant's being about to depart, or of the danger of losing the debt, must be by other and legal evidence. *Brown v. Hinckman*, 75

But see contra, *Terry v. Fargo*, decided January term, 1813, (vol. 10. p. 114,) in which the court said that they did not, in *Brown v. Hinckman*, advert to the act (*sess.* 32. c. 186) amending the former act, and allowing the warrant to issue on the oath of the party.

2. Where an attachment against a concealed debtor, is issued by a justice of the peace, and the proceedings are regular, the justice cannot supersede the attachment, but must, on the return thereof, proceed to hear the cause, as on any other process. *Field v. M'Vicker*, 130

3. If a justice allows fees for subpoenas, on more than 4 witnesses, it is an error, and the judgment will be reversed, *ib.*

4. After issue joined in a cause, before a justice of the peace, the defendant obtained an adjournment for 7 days, and on the return of the venire at the day appointed, he again moved for an adjournment, on account of the absence of a material witness, and offered the requisite security: it was held that the defendant was not entitled to a second adjournment, on the usual affidavit, without showing diligence to procure the witnesses, after the first adjournment, or some reason, to the satisfaction of the court, for his neglect to do so. *Powers v. Lockwood*, 133

5. On the return to a certiorari, the court will not admit the objection, that the justice, before whom it was returned, was a priest, or minister of the gospel, and that the proceedings were, therefore, *coram non iudice*; but will presume that the justice acted under a regular commission. *M'Instry v. Tanner*, 135

6. Where, after issue joined, before a justice, the cause was adjourned at the request of the defendant, and at his request a second adjournment was granted, on account of the absence of material witnesses, it

was held, that any objection to such adjournment was waived by the plaintiff's appearing at the day, and going to trial on the merits. *Willoughby v. Carleton*, 136

7. A warrant issued by a justice of the peace was returned *cepi corpus*, and the plaintiff did not appear, but the justice gave judgment for the plaintiff, for the amount of a note of the defendant, on which was endorsed a request, by him, to the justice, to enter judgment, which note was delivered to the defendant by a third person. It was held, that the plaintiff not appearing, nor any person in his behalf, it was a discontinuance of the suit, and the judgment was, therefore, erroneous. *Sprague v. Shed*, 140

8. Where a person sued for a physician's bill, before a justice, confessed that the plaintiff had performed the services for which he sued, but that the defendant had not employed him, and was under 21 years of age, it was held, that the whole confession must be taken together; and would not authorize the justice to give judgment against the defendant. *Walling v. Toll*, 141

9. In an action for an escape, brought against a constable, before a justice, the execution was not produced, but *parol* evidence given of it; and this not being objected to, at the trial, it was held, that it could not afterwards be alleged for error. *Van Slyck v. Taylor*, 148

10. A justice has no authority to discharge a prisoner on execution, without a special power for that purpose, from the plaintiff in the suit, *ib.*

11. And if a constable, who has a defendant in execution, discharges him, by order of the justice, who has no authority from the plaintiff, the constable is liable for an escape, *ib.*

12. Where, in an action before a justice's court, by a seaman for his wages, the court below allowed wages up to the time of capture, though this court was of opinion that the plaintiff was entitled to wages only to the time of leaving *Messina*, the port from which the vessel sailed, a short time before her capture, they would not reverse the judgment, on account of the difference, it being trifling, and there being no evidence as to the exact time between the leaving of *Messina* and the capture, and some evidence of collusion between the master and captors. *Murray v. Kellogg*, 227

13. A. being arrested at the instance of B., on a charge of having taken B.'s bridle, in order to avoid further trouble and expense, A., on the demand of B., gave him his promissory note for 12 dollars; and B. promised, that if A. would ever show that he had not had the bridle, or that he was innocent of the charge, or if the bridle was found, he would give up the note, and pay A. for his trouble. B. sued A. before a justice, on the note, and recovered judgment for the amount which was paid by A. Afterwards A. brought an action against B., before another justice, to recover back the money so paid, on the ground that he was innocent of the charge, and that B. had got his bridle again, without the knowledge or assistance of A. It was held, that A. having neglected to set up this matter, in bar of the former suit, on the note, to which it would have been a good defence, he could not maintain this action; the former suit, and the neglect, being a bar under the act. *White v. Ward and Aylesworth*, 232

14. In an action before a justice, the constable, who served the process, answered for the plaintiff, and presented to the justice the note on which the suit was brought, and stated the plaintiff's demand. This was held not to be appearing and advocating the cause, within the meaning of the act. (*Sess.* 31. c. 204.) *Phinney v. Earle*, 358

15. The defendant pleaded, that while one T. was owner of, and possessor of the note, he sued him, before a justice, and T. neglected to set off the note, pursuant to the act. But it appeared, that the note was, in fact, offered as a set-off by T. in that suit, but was objected to by the defendant, and rejected by the justice, because, before it became due, and previous to its transfer, the plaintiff, in this suit, had agreed to receive payment in ashes: It was held, that the defendant having objected to the admissibility of the set-off, in the other suit, could not now take advantage of the fact of its not being so set off; and that such set-off by T. was, under the circumstances, properly rejected, *ib.*

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16. Where a constable who served a summons, answered for the plaintiff, and exhibited his demand to the justice, and no objection was made by the defendant, it was held, that this could not be alleged for error. *Kittle v. Baker and Brown*, 354
17. The justice may, on the return of a summons, at the request of the plaintiff, adjourn the cause for six days, without requiring the oath of the absence of material witnesses, *ib.*
18. A constable having taken goods on an execution against *B.*, delivered them to *C.* who gave a receipt for them, promising to deliver them to the constable on demand. The constable suffered the execution to expire, without making any demand of the goods. In an action brought by him against *C.* it was held that *C.* was a mere naked bailee, and that no action would lie against him, until after a demand and refusal of the goods; and that the constable, not having demanded the goods, and levied the amount of the execution, by a sale of them, within the 30 days, had lost, by his neglect, all claim and title to the possession of the goods. *Brown and Holchiss v. Cook*, 361
19. On the return of a summons before a justice, on the 25th October, the parties joined issue, and a venire was awarded, at the instance of the plaintiff, and the justice adjourned the cause to the 1st November, at which time the defendant appeared and demanded an adjournment, which the justice refused, unless he would pay the costs of the venire; it was held that the defendant was entitled to an adjournment, and that the justice had no right to refuse it on that ground. *Hemstreet v. Youngs*, 364
20. In an action before a justice, for the penalty for obstructing a highway, under the act, (*sess.* 24. c. 186,) a plea of title is not valid, unless reduced to writing: and it is sufficient if the plaintiff produces a copy of the record of the establishment of the road, as a public highway; without showing all the proceedings preliminary to laying out the road. *Sage v. Barnes*, 365
21. Where a plaintiff, before a justice, declared for a balance of book account, and also for the settlement of four several notes detained by the defendant, and claimed damages to the amount of 25 dollars; it was held that though the four notes exceeded in amount 100 dollars, yet as the plaintiff claimed only 25 dollars, the justice had jurisdiction. *Bowditch v. Salisbury*, 368
22. Where a defendant is brought up on a warrant, and issue is joined between the parties, the justice may, at the request of the defendant, under the first section of the act, adjourn the cause for one day, or for a less time than three days, *ib.*
23. An action of debt for an escape against a sheriff is cognisable in a justice's court. *Janeen v. Stoutenburgh*, 369

See CERTIORARI. ATTORNEY.

JUSTICES OF THE PEACE.

See COSTS, 2.

JUDGE.

See COURTS OF RECORD.

JURY.

See PRACTICE, 22.

A challenge lies to the array for any partiality or default, in the clerk, in selecting and arraying the panel of the jury. *Gardner v. Turner*, 260

L

LEASE.

1. *A.* let to *B.* a farm for six years, from the 1st May, 1805, and *B.* agreed "to render, yield and pay to *A.*, one half of all the wheat, rye, corn and other grain raised on the farm, in each year, in the bushel," &c. And it was also agreed that either party might put an end to the lease, on giving to the other six months' notice; but if *A.* gave notice to *B.* to quit, he was to allow *B.* "for preparing the ground for seed, and for any other extra labor." In the autumn of 1808, *B.* sowed the ground with wheat, rye, &c. and on the last of February, 1809, while the wheat, &c. was growing, *A.* gave notice to *B.*

to quit, and he, accordingly, left the premises immediately thereafter. In January, 1809, the sheriff, by virtue of an execution against the goods and chattels of *B.* at the suit of *C.*, seized all the personal property of *B.* and sold all his right and title to the wheat, &c. then growing on the farm, to *D.*, who, afterwards, when the grain was ripe, in the summer of 1809, entered on the farm to reap the wheat, &c. and while reaping, *A.* with his servants entered and drove him out, and took and carried away the wheat, &c. In an action of *trespass quare clausum fregit*, brought by *D.* against *A.*, it was held that *B.* had a good right to the crop of wheat, &c. as emblements, which right was not affected by the clause in the lease providing for a compensation to him for preparing the ground, &c. And that the sheriff's sale of this right, while the crop was in the ground, was valid, and that *D.*, the purchaser, had a right to enter, gather and carry away the crop, which could not be affected by *B.*'s subsequent quitting the possession of the farm. That *B.* had the interest in the whole crop, until he had separated and delivered *A.*'s proportion, the reservation being as rent; and the whole property in the crop having passed to *D.* by the sheriff's sale, he might maintain the action against *A.* *Stewart v. Doughty and others*, 108

2. A discharge under the insolvent act, is no bar to an action on an express covenant to pay rent, brought for rent accruing subsequent to the insolvent's discharge. *Lansing v. Prendergast*, 127

See AGREEMENT, 5. TRESPASS QUARE CLAUSUM FREGIT

LIBEL.

1. Where a declaration for a libel, after stating the plaintiff's good name, &c. stated that the defendant, well knowing the premises, &c. maliciously intending to injure the plaintiff, &c. and to bring him into great scandal and disgrace, and to cause it to be believed that the plaintiff had been guilty of the crime of treason, and of the promulgation of treasonable sentiments, &c. published the libel, &c.: it was held that these were not averments necessary to be proved, but mere suggestion by way of inducement, to the libel. *Coleman v. Southwick*, 45
2. Where *A.* published a libel, taken from a paper published by *B.*, as an extract from a paper published by *C.*, in an action brought by *C.* against *A.* for a libel, it was held that the testimony of *D.* that he heard *A.*, before he published the libel, ask *E.* whether he had not seen it in the paper of *C.*, and that *E.* answered "he had," was inadmissible, in mitigation of damages, but that *E.* himself should be produced, if his declarations were proper evidence, *ib.*
3. In actions for slander, libel, and other personal torts, the court will not grant a new trial, on the ground of excessive damages, unless the amount of damages is so flagrantly outrageous and extravagant, as to show that the jury must have been actuated by passion, partiality, prejudice, or corruption, *ib.*
4. Where the defendant in an action for a libel, in his plea, set forth, *in ecc verba*, two declarations by the plaintiff in two other actions for libels, by the same plaintiffs, the court ordered them to be struck out, as being an oppressive encumbrance on the record. *Spencer v. Tabela*, 130
5. *A.* was a witness in a cause between *B.* and *C.*, and, afterwards, *C.* printed and published the following words of *A.* "Our army swore terribly in Flanders, said Uncle Toby; and if Toby was here now, he might say the same of some modern swearers. The man (meaning *A.*) is no slouch at swearing to an old story." In an action brought by *A.* against *C.* for a libel, it was held that these words if they did not import a charge of perjury, in the legal sense, yet they were libellous, as they held up the plaintiff to contempt and ridicule, and as being so thoughtless or so criminal as to be regardless of the obligations of a witness, and, therefore, utterly unworthy of credit. *Steele v. Southwick*, 214
6. Where *C.* published a direct and positive contradiction of what *A.*, a witness at a trial between *B.* and *C.*, had sworn that *C.* had said, this was held not to be a libel, as it was unaccompanied with any imputation of a crime in *A.* *ib.*

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RIGHT-MONEY

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See DEED, 2, 3.

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See SLAVES.

MILITARY BOUNTY LANDS.

A soldier in the revolutionary war, entitled to a lot of land, as bounty, died prior to the 27th March, 1783, before the statute of *descentes*. On the 1st July, 1808, his brothers and sisters, being his next of kin, except Henry his eldest brother, executed a deed for the land to B. Henry, the eldest brother, had previously conveyed the lot to C., who was in possession under the deed at the time of the conveyance to B. In an action of covenant brought by B. against the grantors in his deed, for a breach of the covenant of seisin, it was held that the plaintiff was entitled to recover, the defendant not having shown that they came within the special provision of the 9th section of the act, passed the 5th April, 1803; (*sess.* 26. c. 88;) and the court would not, by intendment, help the claim of the defendants, in opposition to the title of the presumptive heir at law, and of a *bona fide* purchaser under him, at the time. *Stevens v. Woolsey and others*, 325

MILITIA.

See ATTORNEYS, 7. HABEAS CORPUS, 1, 2.

MISDEMEANOR.

See INDICTMENT.

MORTGAGE.

1. Where money is loaned on mortgage, by the loan officers, pursuant to the act of 14th March, 1792, (*sess.* 15. c. 25,) after a default of payment of the interest by the mortgagee, for 22 days after the same is payable, all equity of redemption is forever closed, *ipso facto*, by such default: and the loan officers become vested with an absolute and indefeasible estate in the land, so that this court cannot regard any estate as existing in the mortgagor. *Jackson, ex dem. Limerick, v. Voorhis*, 129
2. No person can come into a court of equity to redeem a mortgage, unless he is entitled to the estate of the mortgagor, or claims a subsisting interest under it. *Grant and others v. Duane and others*, 591
3. S. in 1765, mortgaged a tract of land to G. to secure a debt. In 1766, S. and B. and C. his copartners in trade, being insolvent, made a composition with their creditors, and by indenture, *tripartite*, conveyed all their estates, real and personal, but without specifying the mortgaged premises, to D., E. and F. and to the survivors and survivor, and the heirs of such survivor, parties of the third part, in trust for the creditors of S., B. and C. described as named, and whose debts were specified in a schedule, annexed, of the second part. S. died afterwards; and E. and F. two of the trustees named, died during the revolutionary war, and D. the surviving trustee, died in 1797. In 1799 the executors of D. and named as trustees in his will, filed a bill in chancery against the heirs of G. the mortgagee, for the redemption of the mortgaged premises; and after replication was filed, and publication passed, the heirs of D. in 1806, were made parties complainants. It was held that, after such a lapse of time, it must be presumed that the debts of S., B. and C. had been paid, and the objects of the trust satisfied out of the other trust property, or otherwise; the existence of

any of the debts not being shown; and that the heirs of D. had not, therefore, any interest which could entitle them to a redemption; but that the equity of redemption, if not wholly barred by the lapse of time, remained in the heirs of S. the mortgagor; especially, as the indenture produced by the complainants, and relied on by them as creating the trust estate, was not executed by the trustees, nor by the creditors, nor was any schedule annexed to it, and there was evidence affording a presumption, that the arrangement between S., B. and C. and their creditors, was either not consummated, or was abandoned, or superseded by some other agreement. *Grant and others v. Duane and others*, 591

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NEW-YORK.

See WARDENS OF THE PORT OF.

NEW TRIAL.

1. In an action for a libel, where the jury find a verdict for the defendant, the court will not grant a new trial, merely because they misunderstood or disregarded the evidence. *Hurtin v. Hopkins*, 36
2. In actions for *slander*, *libel*, and other *personal torts*, the court will not grant a new trial, on the ground of excessive damages, unless the amount of damages is so flagrantly outrageous and extravagant, as manifestly to show that the jury must have been actuated by passion, partiality, prejudice or corruption. *Coleman v. Southwick*, 45
3. In an action for slander, after a verdict for the plaintiff, a new trial will not be granted to the defendant, on affidavit of newly discovered evidence, which went merely in support of a plea of *justification*. *Beers v. Root*, 264
4. *Aliter*, if the new evidence goes only to the plea of *not guilty*. *Beers v. Root*, 264
5. Where there was evidence on both sides, and the jury found a verdict for the plaintiff, in an action for goods sold and delivered, and the defendant relied on a payment and receipt in full, being for a promissory note, the maker of which, afterwards, proved insolvent, the court refused to grant a new trial. *Johnson v. Weed and another*, 310

See PRACTICE, 2. 27.

NON-INTERCOURSE ACTS.

See ACTION FOR MONEY HAD AND RECEIVED, 3, 4.

NOTICE TO QUIT.

See EJECTMENT.

O

OFFICER.

1. The acts of officers *de facto* are valid, as respects the public, and the rights of third persons. *M'Intyre v. Tanner*, 135
2. An officer intrusted by the common law or statute, is liable to an action for negligence in the performance of his trust or duty, or for fraud or neglect in the execution of his office. *Jenner v. Joliffe*, 381
3. If an officer, having authority to attach the goods of a person, keeps them in an unsafe place, or exposes them to destruction, he is liable for the damages sustained, *ib.*
4. And it seems, that if a plaintiff in a process of attachment, directs or causes the officer so to act, as to misbehave in the execution of his office, and produce thereby the loss or destruction of the goods in his custody, the party injured has his election to bring his action either against the principal or the officer, *ib.*

See ASSUMPSIT. ACTION FOR MONEY HAD AND RECEIVED, 3, 4, 5.

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PARENT AND CHILD.

See ACTION ON THE CASE.

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PARTNERSHIP

1. Where one of two partners executed an arbitration bond, to which he subscribed the name of the firm and affixed a seal, the other partner having previously read and approved the bond, and consented that his copartner should execute it for both, and being in the store at the time of the execution, though it was not actually signed and sealed in his immediate presence, it was held a good execution of the bond, so as to make it the deed of both. *Mackay v. Bloodgood*, 285
2. *A., B. & C. and D. & E.* agreed to run a line of stages from *Albany to Utica*; each of the three partners was to run a separate portion of the road, and to furnish his own horses and carriages at his own expense and risk; but extra expenses for extra carriages were to be paid jointly. *A. B. & D.* met at *Palatine*, in the county of *Montgomery*, and the accounts between the parties were examined and adjusted by *F.* at their request, who found a balance due from *D. & E.* to *B. & C.* for 144 dollars, for moneys received in *Albany*. It appearing that *D. & E.* were jointly concerned in running their part of the line of stages, and generally understood to be partners, *E.* was held jointly chargeable for the money received by *D.* and for his acts; and that an action for money had and received would lie in the Mayor's Court in *Albany*, at the suit of *B. & C.* against *D. & E.* to recover the balance so stated to be due: there being no such partnership existing between all the five persons, as would prevent the suit. *Welmors and another v. Baker and another*, 307
3. *A. & M.* partners in trade, owned three fourths of a vessel and *B. & K.* also partners in trade, owned the other fourth. These joint owners agreed to fit out the vessel on a voyage from *New-York to Lagaira*. *A. & M.* purchased and paid for three fourths of the cargo, but chiefly, if not wholly, with notes lent them by *P. & R.* commission-merchants; *B. & K.* paid for the other fourth of the cargo, and shipped the same on board of the vessel; but it was not distinguished from the rest of the cargo, by any particular marks; and the whole cargo was sold at *Lagaira*, for the joint account and benefit of the owners, *A. & M.* and *B. & K.* *M.* went out as the supercargo and agent; and having sold the outward cargo at *Lagaira*, he invested the proceeds in a return cargo, with which the vessel set sail on her return to *New-York*, but was forced, by stress of weather, to put into *Norfolk*, where *M.* sold the return cargo, except a small quantity of coffee; and for the avails, he received bills of exchange which he endorsed and remitted, with the parcel of coffee, to *P. & R.* to whom *A. & M.* were jointly indebted, and *M.* on his private account, to a greater amount, for advances made for the purchase of the outward cargo. *P. & R.* collected the bills and sold the coffee, so remitted, and applied the proceeds to the payment of the debts so due to him from *A. & M.* *P. & R.* had notice, if not at the time of the shipment of the outward cargo, certainly before the bills remitted by *M.* were payable, and the coffee was sold and converted into money, that *B. & K.* were interested in and owned one fourth of the cargo, so sold by *M.*; and *B. & K.* demanded of *P. & R.* their proportion of the proceeds so remitted by *M.* after deducting charges, &c. but *P. & R.* refused to pay or deliver the same, alleging their right to retain the same, to pay the debts due to them from *A. & M.* It was held, that there was no partnership existing between *A. & M.* and *B. & K.* so as to render the disposition of the return cargo, by *M.* binding, as the act of a partner, on *B. & K.* *Post v. Russel v. Kimberley & Brace*, in error, 170
4. And that there was no agreement constituting a partnership between *A. & M.* and *B. & K.* in the purchase of the outward cargo, or to share jointly in the ultimate profit and loss of the adventure, *ib.*
5. Admitting there was a partnership between them, so far as respected the transporting and selling of the outward cargo, for the joint profit and loss of the owners, yet such partnership terminated with the sale of the outward cargo; and their interests in the return cargo became separate and distinct, each party being entitled to his respective proportion of it, without any concern in the profit and loss, which might ultimately arise, *ib.*
6. And that *P. & R.* not having received the bills of exchange, in the course of trade, and knowing of

the interest of *B. & K.* before the bills were paid, had no right to retain their interest, for the payment of the debt of *A. & M.* but must account to *B. & K.* for their proportion, *ib.*

PARTITION

Though where a tenancy in common is admitted, a parol partition, followed by possession under it, will be valid; yet where the whole right or title of the party setting up the tenancy in common and parol partition is denied, a parol partition and possession under it, will not be sufficient to transfer the title. *Jackson, ex dem. Van Buren, v. Voorburgh*, 270

PASSAGE-MONEY.

See FREIGHT.

PATENT.

1. A patent was granted in 1761, which included also lands granted by a patent in 1737, and the second patent recited the first, and the proprietors of the second patent, who had made purchases under the first, made partition of the lands held under the second, excepting two lots, which were included in the boundaries of the first patent. In an action of ejectment, the plaintiff claimed the two lots, under the second patent, and the defendants claimed to hold under *A.*, who held under *B.* one of the patentees, named in the second patent: it was held, that the recital of the former patent, being of a particular fact, directly affirmed, estopped the plaintiff from denying the existence of such prior patent; that the mere fact, that *B.* was a patentee in the patent of 1761, was not sufficient to prove that he held the two lots under that patent; the omission to divide the two lots being evidence of the sense of the proprietors of the second patent, that they did not claim those two lots under it. *Jackson, ex dem. Benner and others, v. Wilson and others*, 22
2. Where a patent for a tract of land is granted, reserving a certain number of acres for public uses, it seems that the patentee has the right to elect in what part of the tract the land reserved shall be located. *Jackson, ex dem. Newcomb, v. Smith and others*, 100

PLEADING.

1. If an error in fact be well assigned, as the infancy of the party, and the defendant pleads in *nullo est erratum*, he admits the fact. *Bliss v. Rice*, 159
2. The pending of a suit in another state, or a foreign court, by the plaintiff against the defendant, for the same cause of action, is no stay or bar to a suit brought here; the *exceptio rei judicate* applies only to final or definitive sentences abroad on the merits of the case. *Bowen & Seymour v. Joy*, 221
3. A plea in bar, as of a discharge under the insolvent act, pleaded *puis darrein continuance*, need not be verified by affidavit, unless tendered at the circuit or sittings, nor then, if probable cause of its truth is shown to the judge, who may receive it, without oath, or not, at his discretion. *Baucker v. Ash*, 250
4. When such a plea is pleaded in bar, without an affidavit, it cannot be treated as a *nullity*, but the plaintiff must either reply to it, or apply to the court to have it set aside, *ib.*
5. Though more than one continuance has elapsed, a defendant may plead his discharge under the insolvent act, *nunc pro tunc*, on payment of costs. *Morgan & Smith v. Dyer*, 255
6. In an action of debt on a bond, given to the sheriff, to save harmless and indemnify him "for, touching and concerning the execution of all processes, writs, &c. by his deputy; the plaintiff in his replication assigned a breach that the defendant had arrested *A. B.* on a *capias ad respondendum*, and suffered him to go at large, without sufficient bail; and that the plaintiff had been attached for not bringing in the body, &c. and had been obliged to pay a certain sum, and was damaged, &c. The defendant rejoined that he took sufficient bail, to wit, *C. D.* who executed the bail bond with *A. B.* for his appearance, and was at the time good and responsible, &c. On demurrer the rejoinder was held to be insufficient; the defendants, by their bond, having assumed every risk which the law attached to the execution of process, one of which was the continued responsibility of the bail to the arrest. *Stevens v. Boyce and Darley*, 292

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- 7 An argumentative plea is good, on a general demurrer. *Spencer v. Southwick*, 314
- 8 Certainty to a common intent is sufficient in a special plea; and this certainty is what, on a fair and reasonable construction, may be called certain, without recurring to possible facts, *ib.*
- 9 A plea to an action of debt, on a bond conditioned to pay 77 pounds, that the defendant paid the plaintiff 3*l.* 9*s.* 10*d.* which the plaintiff "accepted and received in full payment of the sum mentioned in the condition of the bond, and in full of all demands whatsoever," is bad. *Dederick v. Leman*, 333.
10. Where, in a declaration on a bond conditioned to pay several sums of money, at several days, the plaintiff assigned two several breaches, for the non-payment of two several sums, it was held bad, on special demurrer, for duplicity. *Taft v. Brewster and others*, 334
11. In an action of debt, on a bond against A., B. and C., who were described in the declaration, with the addition and description of "Trustees of the Baptist Society of the town of R." and who executed the bond with their individual names and seals; but with that addition, it was held, that this was a mere description of persons, and the defendants were liable, in their individual capacity, *ib.*

See LIBEL. DEED, 4. PRACTICE, 16. COVENANT, 2.

PRACTICE.

1. Where a declaration is filed in chief, after receiving notice of special bail, it is a waiver of any exception to the sufficiency of such bail, though the bail-piece was not actually filed in the clerk's office at the time the notice was given; and the plaintiff cannot, on the ground of the insufficiency of the bail, proceed against the sheriff. *People v. Stevens*, 72
2. Where a plaintiff was nonsuited at the trial, the court refused to set aside the nonsuit, and grant a new trial on the ground, that the plaintiff was surprised by the defence set up, and had come unprepared to meet it. *Jackson, ex dem. Horton and others, v. Roe*, 77
3. After argument of a cause, and a judgment thereon, and the term ended, it is too late to move to amend the record. *Killpatrick v. Ross*, 73
4. If a plaintiff who sues out a *scire facias* to revive a judgment, does not proceed upon it within a year and a day, it is a discontinuance: and where, after *scire faci* was returned, and a default entered for want of not appearing and pleading, the plaintiff suffered more than a year and a day to elapse, before he entered judgment, it was held to be a discontinuance, and the judgment irregular. *Vanderheyden v. Gardiner*, 79
5. This court exercises an equitable jurisdiction over judgments entered upon bonds and warrants of attorney, and on the application of a creditor, stating that a judgment had been fraudulently obtained upon a bond and warrant of attorney, an issue was directed between the parties, to try the truth of the allegation, and the plaintiff directed to prove the consideration of the bond, and the creditor to subpoena witnesses in the name of the defendant, to attend the trial. *Frasier v. Frasier*, 80
6. Where a bail-bond is taken in a court of common pleas, and the bail resides out of the county, an action may be maintained by the assignee of such bond in this court, who will grant relief to the bail, on the same terms as if the bond had been taken in this court. The bail is bound to pay common pleas costs only. *Haskell v. Bates*, 80
7. Bail to the sheriff, as well as special bail, will always be relieved on the return of the writ against them, upon the usual terms, *ib.*
8. Where no *venue* is laid in the body of the declaration, the *venue* in the margin is sufficient. *State v. Post*, 81
9. In an action of ejectment the court cannot compel the defendant to consent to a survey of the premises in his possession. *Jackson, ex dem. Rensselaer, v. Hogeboom*, 83
10. A *scire facias* cannot be issued to revive a judgment of more than 10 years' standing, without a previous affidavit of the judgment being unsatisfied. *Lansing v. Lyons*, 84
11. After a *scire facias* was issued and returned *scire faci*, without such affidavit, the court refused to allow it to be filed *nunc pro tunc*, but quashed the *scire facias*, *ib.*
12. Bail have 8 entire days in full term, after the return of process against them, within which to surrender their principal; but Sunday is to be reckoned one of the eight days. *Brown v. Smith*, 84
13. In proceedings against the sheriff, in order to obtain an attachment, the proceedings until the attachment is granted must be entitled in the original cause. *People v. Morris*, 160
14. In an action of *dower*, if the tenant be an infant he must appear and defend by guardian. *Hillyer v. Laridors*, 160
15. The place where the cause of action arose is, *prima facie*, the place where the *venue* ought to be laid; and if the defendant shows where the cause of action arose exclusively, and that he has material witnesses residing there, he has a right to change the *venue*, and he cannot be divested of this right, unless the plaintiff stipulates to give evidence arising in the county where he has laid the *venue*, and states also, by affidavit, that he has material witnesses arising in that county. *Durges v. Orcutt*, 248
16. A plea in bar, pleaded *puis darrein continuance*, in bank, without an affidavit, cannot be treated as a nullity, but the plaintiff must either reply to it, or apply to the court to have it set aside. *Banker v. Ash*, 250
17. In an action of debt on a judgment, the defendant pleaded *nul tiel record*, on which issue was joined on the 9th September, 1811, and the cause noticed for trial, for October term following, but was not tried. On the 9th December, the defendant pleaded his discharge, under the insolvent act, dated 24th September, which plea was verified by affidavit, and a copy served on the plaintiff's attorney, on the 1st January, 1812. The plaintiff's attorney, on the 28th December, 1811, served a notice of trial by record, on the defendant's attorney, residing 150 miles from Albany, and in January term, obtained judgment, and in July following gave notice of taxing costs, to the defendant's attorney, which was the first notice he had of the plaintiff's attorney having proceeded on the issue. It was held, that the defendant was not too late, in August term, 1812, to move to set aside the judgment; that the plaintiff's attorney had no right to treat the plea *puis darrein continuance* as a nullity; but should have demurred, or taken issue on it, or have applied to the court to set it aside, as being out of season. *Morgan v. Dyer*, 255
18. Though more than one continuance has intervened, the court will allow a defendant to plead his discharge under the insolvent act, *nunc pro tunc*, on payment of costs, *ib.*
19. Where a regular judgment, by default, was obtained by a lessor of the plaintiff, in an action of ejectment, who went for a vacant possession, it was set aside, and the person claiming to be owner, on an affidavit of merits, was admitted as a defendant, on payment of costs. *Wood, ex dem. Elmendorf, v. Wood*, 257
20. The *venue*, in a suit by *scire facias*, on a judgment, must be laid in the county in which the *venue* in the original action was laid. *McGill v. Perrigo*, 259
21. The validity of a certificate of discharge, under the insolvent act, will not be tried by affidavit, on motion for the insolvent's discharge from custody, but the plaintiff must resort to his action. *Noble v. Johnson*, 258
22. A challenge lies to the array, for any partiality or default in the clerk, in selecting and arraying a jury. *Gardner v. Turner*, 260
23. Where a challenge to the array was made, because the clerk drew 72 names out of the box, and put them in a list, and then designated 36 names so drawn to be a panel for the circuit, and the other 36 names to be a panel for the Court of Common Pleas, and the defendant denied the truth of the fact, and offered to join issue thereon, and the judge refused to grant the *venire* or to pass the cause on the calendar, and no issue was joined on the challenge; and the plaintiff, under these circumstances, refused to bring on the cause to trial; it was held, that the cause of challenge alleged was sufficient, and ought not to have been overruled by the judge, but he should have appointed *triers*, to try the truth of the fact; and that the defendant was not, therefore, entitled to judgment as in case

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- of nonsuit, because the plaintiff did not bring on the cause to trial, *ib.*
24. Separate suits were brought by the same persons against the maker of several promissory notes, payable to the same person, who endorsed them to the plaintiff. The notes were dated on different days, and were for different sums, payable at different times, but were all due when the suits were commenced, and the writs were issued and served at the same time on the defendant. It was held that the suits could not be consolidated. *Thompson v. Shepherd*, 262
25. But it seems, that where separate suits are brought on notes and contracts made at the same time, and between the same parties, and where the defence must be the same in all, a consolidation will be granted, *ib.*
26. A judge in vacation may enlarge the time for making a case. *Black v. Brown*, 264
27. In real actions a special imparlance saves the rights of the party: and after a special imparlance the tenant may vouch to warranty. *Whitbeck v. Schoeffel*, 265
28. Where a verdict is set aside and a new trial granted, a copy of the rule must be served on the plaintiff's attorney, before the defendant can move for a nonsuit, for not proceeding to trial. *Jackson, ex dem. Baner and others, v. Wilson*, 265
29. Where an attorney is sued in an inferior court, in which he is privileged from arrest, the cause cannot be removed into this court by *habeas corpus cum causa*. *Webb v. Cleveland*, 266
30. A commission will be granted to examine an officer in the army of the United States, on an affidavit of his being a material witness and expected to be ordered away. *Cardall v. Wilcox*, 266

See ATTORNEY, 6. COSTS, 2.

PRISONER.

See INDICTMENT. SHERIFF.

PROMISSORY NOTES

1. A gave to B. a note or due bill in the following words: "Due to B. 170 dollars, value received;" on which B. endorsed his name and delivered it to C, who afterwards demanded payment of A. in Albany, who said he was going to New-York, and would pay it there, and A. afterwards paid the amount to B. in New-York, and took his receipt in full for the due bill, which still remained in the hands of C., who, afterwards, brought a suit against A. in the name of B. on the due bill: It was held that C. was not entitled to recover; there not being sufficient evidence of notice to A. of an assignment to C. who ought, when he demanded payment of A., to have shown him the note and the endorsement thereon by B.; or explicitly stated its being assigned by B. *Meghan v. Mills*, 64
2. A note payable to B. or bearer in *York state bills or specie*, is a negotiable note under the statute, and may be declared on as such. *Keith v. Jones*, 120
3. Where a promissory note payable to order, was endorsed 5 years after it was due, it was held that the endorsee was bound, notwithstanding, to prove a demand of payment of the maker, and notice to the endorser; for there is no difference, in this respect, whether the note is endorsed before or after it is due. *Berry v. Robinson*, 121
4. The demand of payment and notice of non-payment, in every case, where a maker or drawer exists, is an implied condition of the contract or endorsement, *ib.*
5. The payee endorser of a promissory note, who had been sued by the endorsee, in default of the maker, cannot compel the maker to pay the costs of such suit; the maker being liable to the payee for the amount of the note only. *Simpson v. Griffin*, 131
6. A note by which A. promised to pay the P. & D. and Company of a turnpike road 125 dollars, for *five shares* of the capital stock of the corporation, and at such time and place as the president, directors and company should require, is a good promissory note, within the statute, and may be declared on as such. *The P. & D. and Company of the Goshen and Minisink Turnpike v. Hartin*, 217
7. Every note within the statute imports a consideration, unless the contrary appears in the note itself, *ib.*
8. A. in 1808 gave B. a promissory note payable on demand, which B. afterwards transferred to C.,

who, in 1810, sued A. on the note, before a justice, and recovered the amount, though A. had previously paid it to B. It was held that C. took the note subject to all equity between A. and B.; but that A. ought to have set up the payment to B. as a defence to the suit brought by C., and not having done so, he could not make the recovery against him, the ground of an action for money had and received against B. *Leomis v. Pulver*, 244

9. A promissory note of a third person taken for goods sold and delivered, is no payment, unless the vendor expressly agrees to take it absolutely in payment. *Johnson v. Weed and another*, 310
10. And where a note was taken in payment, and a receipt in full given by the vendor, for the goods; it was held to be a question of fact, for a jury to decide, under all circumstances, whether there was such a special agreement or not, *ib.*
11. Separate suits were brought by the endorsee of a promissory note against the endorser and maker. In the suit against the endorser A. became special bail. The plaintiff recovered judgments in both suits, in August, 1810, and a *fi. fa.* issued against the maker, was returned, in November, satisfied. A *ca. sa.* was issued on the judgment against the endorser, which was returned *non est inexcusatus*, in January, 1811, and an action of debt was brought on the recognisance against his bail, who pleaded payment, &c. It was held, that the recognisance being forfeited, there must be judgment for the penalty; but the payment by the maker, might be shown in mitigation of damages, so that damages should be assessed for the costs only of the suit, against the principal; or judgment *pro forma* might be entered for the penalty, and execution taken out, for such damages, and the costs of the suit against the bail. *Wattles v. Laird*, 327

POSSESSION.

See ADVERSE POSSESSION. EJECTMENT.

POWER OF ATTORNEY.

See DEED, 9.

R

RECEIPT.

Where A. sued B. on a contract for the delivery of goods, and a settlement was made between them, and B. gave A. a receipt in full for the balance due for the goods delivered; this was held no bar to a subsequent action by B. against A. for a misfeasance, in regard to the goods, part of the subject of the same contract, and not delivered, but lost, as B. alleged, by the misconduct of A. *Jenner v. Jephth*, 331

RECITAL.

See PATENT.

RECORD.

1. On the issue of *nil tial record*, the record of a judgment was produced, to rebut which the plaintiff produced a rule of the court, subsequent to the judgment, setting it aside for irregularity: it was held that the entry of the rule on the minutes could not be received as evidence against the record, which imports verity, and can be tried only by itself; but the *vacatur* must be enrolled and entered of record. *Crossell v. Fyres*, 267
2. No proceeding is regarded as matter of record, until it is enrolled, *ib.*

REGISTRY OF DEEDS.

See DEED, 7, 8.

RELIGIOUS CORPORATION.

See CORPORATION.

RENT.

See LEASE.

RESERVATION.

See PATENT, 2. EJECTMENT, 12. TRESPASS QUARE CLAUSUM FREGIT, 7.

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REVENUE OFFICERS.

See DUTIES.

SALE.

See FRAUD AND FRAUDULENT CONVEYANCES, 1, 2, 3, 5, 6.

SCIRE FACIAS.

See PRACTICE, 4, 9, 10. EXECUTION, 6.

SEAMEN'S WAGES.

1. If, during a voyage, a seaman is compelled to leave the ship, on account of ill usage and cruel treatment, by the master, or through his agency, and for fear of his personal safety, it is not a case of voluntary desertion, and the seaman is entitled to his full wages for the whole voyage. *Ward v. Ames*, 133
2. A seaman signed articles for a voyage, as he understood, and as was represented to him by the master, from *New-York* to *Archangel* and back; though the articles were, in fact, for a voyage from *Middletown, Connecticut*, to any port or ports in *Europe*, for 3 years, and back to the *United States*. The vessel went from *New-York* to *Sicily*, *Sardinia* and *Messina*, at which places she disposed of her outward cargo, and took in a load of salt, at *Messina*, where she lay 7 months, during most of which time the captain was absent. She left *Messina*, for *Gotterdamph*, and was, afterwards, captured off *Minorca*, by a *French* privateer, and carried into *Tobago*, in *Africa*, and there condemned. The seaman brought an action to recover his wages for the whole voyage, and also for a breach of the shipping articles. It was held, that he was entitled to wages from *New-York* to *Messina*, and during the stay there, the detention being an act of the captain; but not from *Messina*, that being a new intermediate voyage; and the capture put an end to the freight, as well as the wages for that voyage. *Murray v. Kellogg*, 227
3. Seamen signed articles for a voyage from *New-York* to *North Carolina*, and thence to a port in *Europe*. The vessel went from *New-York* to *North Carolina*, in ballast, and there took in a cargo and sailed for *Europe*; but was compelled, in consequence of springing a leak, to put into *New-York*, for repairs. The seamen made no application, under the law of the *United States*, for repairs; but the owners voluntarily caused repairs to be made; and after the repairs, the vessel was, in the opinion of the master carpenter and three shipbuilders, perfectly seaworthy; though seven journeymen carpenters were of opinion that she was not seaworthy; and on that ground the seamen refused to proceed on the voyage. No freight was earned at *New-York*, the cargo having been landed, for the purpose only of repairs, and was reloaded when they were completed. In an action brought by one of the seamen for his wages, it was held, that he was not entitled to recover, there being no freight earned, nor any loss of voyage imputable to the master or owners. *Porter v. Andrews*, 350

SENT-OFF.

See JUSTICE'S COURT, 13, 14, 15.

SHERIFF.

1. Where an indenture of assignment of prisoners from the old to the new sheriff, specified a suit by the title of "*Tallmadge, Smith & Co. v. Brooklyn*," this was held sufficiently certain without giving the names of all the plaintiffs, at large; and was a sufficient notice to the new sheriff of the execution against the prisoner. *Tallmadge and others v. Richmond*, 85
2. Where the bond taken by a new sheriff, for his security on granting the liberties of the gaol to a prisoner in execution, stated the amount of the execution, for which he was in custody, it was held conclusive as to the fact, so that the sheriff, in an action, afterwards, against him for an escape, could not allege that it was not the true sum, or that he had not notice of the true sum, before the escape, *ib.*
3. An action of *assumpsit* lies against a sheriff, for the amount of the sale of goods by him, under a *condemni exponas*, though the purchaser to whom

the goods are delivered, refuses to pay for them. *Denton and others v. Livingston*, 94

4. Where a sheriff returns, that he has levied on the goods of the defendant, to the value of the debt and damages in the execution, whether he is bound by the value returned or not; *dubietur*, *ib.*
5. If the sheriff delivers goods seized and sold on execution, without receiving the money, he is answerable for the amount, *ib.*
6. Bank shares, or shares in a public library, being mere choses in action, cannot be seized and sold under an execution, *ib.*
7. A sheriff may look to the attorney in the suit, for his fees. *Ousterhout v. Day*, 114
8. And admitting that he may look to the client, in the first instance, yet if he elects to sue the attorney, without making any demand of the client, especially after a lapse of 5 years, it is a waiver of his right to call on the client, *ib.*
9. Where *A.* sued out an attachment against *B.* for not performing an award, returnable the 29th *May*, and delivered it to the sheriff, who arrested *B.* on the 31st *May*, and the parties appeared in court on the 1st *June*; it was held, that it was lawful for the sheriff to arrest a party on the return day of the attachment, but as *A.* had given him no direction to make the arrest afterwards, no action of *trespass* would lie against *A.* but the *trespass*, if any, was committed by the sheriff. *Adams v. Freeman*, 117
10. A party who sues out and delivers to a sheriff, a valid process, is not responsible for any irregularity of the sheriff in executing the process, unless it appears, affirmatively, that the sheriff acted by his orders: for the party is answerable only for the validity of the process, and for good faith in suing it out, *ib.*
11. Whether an assent to the *trespass*, afterwards, by the party, will, in such case, make him a trespasser *ab initio*? *dubietur*, *ib.*
12. The act of the 5th *April*, 1810, (*sess.* 33. c. 187,) is intended only for the relief of the sheriff, coroner, or other officer, when sued for an escape. *Mandell, Assignee, &c. v. Barry and others*, 234
13. Where an action, therefore, is brought by the assignee of the bond given to the sheriff, on granting the gaol liberties, against the original debtor and his sureties, on the bond, a voluntary return after a voluntary escape, and before suit brought, is no defence; and the assignee may recover the amount of the debt in the original suit, though no suit has been brought against the sheriff for the escape, *ib.*
14. Where a defendant, arrested on *main* process, having been surrendered into the custody of the sheriff, by his bail, was permitted to go at large, within the liberties of the gaol, on giving a bond as security to the sheriff, in the usual form, and afterwards escaped, and went beyond the liberties, and the sheriff, on the 1st *October*, 1810, assigned the bond to the plaintiff, who brought an action thereon; it was held, that the taking of the bond was authorized by the act of the 30th *March*, 1801, (*sess.* 24. c. 91,) the defendant being in custody on civil process only; and the bond, therefore, assignable, under the act of the 28th *March*, 1809. (*Sess.* 32. c. 148.) *Kellogg, Assignee, &c. v. Manro & Brown*, 300
15. The plaintiff in the suit on such a bond, assigned by the sheriff, is *prima facie* entitled to recover the whole debt due in the original suit; or, at least, as much as he has actually lost by the escape, *ib.*
16. A sheriff is entitled to his reasonable fees and expenses, for bringing up a former sheriff, on an attachment, for a contempt in not returning process. *Smith v. Birdsall*, 308
17. Where a deputy sheriff arrested a defendant, on an execution, and left him in the custody of two brothers of the defendant, and went to serve other process, and did not take him to gaol until the next day; it was held to be an escape, for which the sheriff was liable; the persons in whose custody the party was left, having no authority to detain him, in the absence of the deputy sheriff. *Palmer v. Hatch*, 320

See EXECUTION, 2, 3, 4. OFFICER, 2, 3, 4. PLEADING, 5.

SLAVES.

1. *A.*, the owner of a slave in this state, went into *Vermont* to reclaim the slave who had run away from the service of his master, and resided there as a free man. *A.* took the slave, but while in his possession

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tion, *B.* sued out an attachment against the slave, for a debt, on which the slave was arrested by an officer, and forcibly taken out of the possession of *A.* and imprisoned in *Vermont*. *A.* afterwards brought an action of trespass against *B.* in this state, for taking away his slave; and it was held, that under the law of the *United States*, *A.* had a right to reclaim his slave, as a fugitive from service; and that, as the slave was incapable of contracting a debt, the attachment was illegal and void, and no justification to *B.* who was guilty of trespass, for which an action would lie in this state. *Glen v. Hodges*, 67

2. *Parol* declarations made more than twenty years ago, by the owner of a slave, that he purchased her to make her free, and that he meant her to be free, were held to be a manumission of such slave. *Wells v. Lane*, 144
3. Whether since the statute of the 8th April, 1801, (sess. 24. c. 268,) a slave can be manumitted without some instrument in writing? *Quere*, *ib.*
4. The overseers of the poor of the town of *O.* gave a certificate in writing, "that the bearer *J.* the slave of *H.*, was under the age of fifty years, and of sufficient ability to get his living;" and at the bottom of the certificate it was written; "and we do hereby manumit the same;" and the whole signed by the overseers, but not by the executors of *H.* to whom the slave belonged, and the certificate was recorded in the office of the clerk of the town; it was held, that the certificate being recorded at the request of *H.* the owner of the slave, was conclusive evidence to charge the town with the future maintenance of such slave, when a pauper. *Executors of Hopkins v. Field & Young, Overseers, &c.* 225
5. Whether the slave was duly manumitted or not, as respected his former owner, was a question between the slave and such former owner, with which the town had no concern; but it seems this was a sufficient manumission to conclude the owner, *ib.*

SOLDIER OF THE UNITED STATES

See HABEAS CORPUS.

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STEAMBOATS.

See CHANCERY, 15.

STOCKBRIDGE INDIANS.

- A person cannot lawfully enter on the lands of the *Stockbridge Indians*, and cut and carry away timber growing thereon, even with their consent; and where a person, with the license of the peace-makers of the tribe, entered and cut down trees of which he made shingles; it was held that he was a trespasser, and acquired no property in the timber or shingles. *Chandler v. Edson*, 302

SURVEY OF LANDS.

1. Where a survey of land was made by the direction and under the observation of the grantee, it was held that he could not, afterwards, especially after the lapse of twenty-six years, vary the location, but must be deemed as having assented to the survey as made. *Jackson, ex dem. Newcomb, v. Smith*, 100
2. *Bleecker's* map of the survey of the *Heerick Patent*, made in 1754, was held not to be conclusive, where it differed from the actual survey or field-book made by him. *Jackson, ex dem. Jackson, v. Joy*, 102

T

TOWN.

1. The inhabitants of a town, not being incorporated, are incapable, in law, to take an estate in fee; and a promise in a deed to *A.* dated in 1722, reserving to the inhabitants of *Rechester*, not incorporated, a right to cut wood on the land conveyed, when not enclosed, was held void. *Hornbeck v. Westbroek*, 73
2. If such a reservation were operative, it would only give the right to the inhabitants of the town, living at the time of the grant, as the promise contained no words of perpetuity, *ib.*

TOLL.

See TURNPIKE, 1, 2.

TRESPASS.

1. A party who sues out and delivers to a sheriff valid process, is not responsible for any irregularity of the sheriff in executing such process, unless it appears, affirmatively, that the sheriff acted by the orders of the party, when the trespass was committed: the party being answerable only for the validity of the process, and good faith in suing it out. *Adams v. Freeman*, 117
2. Whether an assent, afterwards, by the party, to the trespass, will make him a trespasser *ab initio*, *dubitatur*. *Adams v. Freeman*, 117
3. But if so, such assent must be clear and explicit, and founded on a full knowledge of the trespass, *ib.*
4. Where *A.* sued out an attachment against *B.* for not performing an award, returnable on the 22th May, and delivered it to the sheriff, who arrested *B.* on the 31st May, it was held, that *A.* having given no direction to the sheriff, to make the arrest after the return day, was not liable in an action of trespass, *ib.*
5. Where the dog of *A.* is on the land of *B.* chasing fowls, and in the act of destroying one, *B.* may lawfully shoot the dog, in the same manner as if the dog were chasing and killing sheep, or other reclaimed and useful animals. *Leonard v. Wilkins*, 233
6. And it is enough that the fowl is on the land of *B.* without showing property in the fowl, *ib.*
7. And the jury are to decide whether the killing of the dog is justified by the necessity of the case, and was requisite to preserve the fowl, *ib.*
8. *A.* lent his wagon to *B.* and *C.* who put their own horses to it; and *A.*, at the invitation of *B.* and *C.*, rode with them in the wagon. *B.*, in driving the wagon, ran with so much violence against the horse of *D.*, who was before the wagon in the road, and had turned out to avoid it, that the horse was wounded by the tongue of the wagon, in consequence of which he died. In an action of trespass, brought by *D.* against *A.*, *B.* and *C.*, it was held, that *A.* was not a mere passenger, but equally liable with *B.* and *C.* for a joint trespass. *Bishop v. Ely and others*, 204

See SLAYED. SHERIFF, 9, 10.

TRESPASS QUARE CLAUSUM FREIGHT.

1. An agreement for the purchase of land, does not, of itself, amount to a license to the purchaser to enter on the land; nor does a license to enter, imply

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- a permission to cut and consume the timber. *Suffern v. Tupper*, 35
2. And where a person, after an agreement to purchase land, entered and cut timber, and the agreement was afterwards rescinded by him, he was held liable, as a trespasser, *ib.*
 3. A person must have the actual and lawful possession of real property, to enable him to maintain trespass. *Stuyvesant v. Tompkins and Dunham*, 61
 4. The lands of A. and B. were separated by a crooked fence, and A. showed to B. two extreme points of the division line, and declared that the true boundary line was a straight line; and B. caused a straight line to be run between the two points, and put up another fence accordingly, by which he included some of the land which had been in the possession of A. and his ancestors above 25 years; and before the fence was put up A. gave notice to B. not to erect it; and after it was put up, A. came and pulled it down. In an action of trespass brought against A. by B. it was held, that the parol declaration of A. was not sufficient to change the possession; and having availed himself of the *locus penitentis*, his previous admission did not sanction the change of the boundary line. *Stuyvesant v. Tompkins and Dunham*, 61
 5. A. let a farm to B. for six years from May, 1805, and B. agreed "to render and pay to A. the one half of all the wheat, rye, corn, and other grain raised on the farm in each year," &c.; and it was agreed that either party might put an end to the lease, giving six months' notice; but if A. gave notice to quit, he was to allow B. "for preparing the ground for seed, and any other extra labor." In the autumn of 1808, B. sowed the ground with wheat, &c. In February, 1809, A. gave him notice to quit, and he accordingly left the premises. In January, 1809, the sheriff, by virtue of an execution, seized all the goods and chattels of B. and sold all the right and title of B. to the wheat, &c. then growing on the farm, to D., the highest bidder, who, in the summer, entered on the farm, to reap the wheat, and while reaping, A., with his servants, entered and drove him out, and took and carried away the wheat, &c. It was held, that B. had the interest in the whole crop, until he had separated and delivered A.'s proportion, the reservation being as rent; and that the sheriff's sale of this right, &c. was valid, and D. had a right of ingress, &c. to gather and carry away the crop, and might maintain trespass *quare clausum fregit* against A. and his servants. *Stewart v. Doughty*, 108
 6. A. assigned to B. all his interest in wheat growing on the land of C. which had been hired and sowed by A. on shares; it was held, that an action of trespass for cutting and carrying away the wheat, could not be maintained in the name of A. by his assignee, B., but the suit should be in the name of B. to whom the property was transferred. *Carter v. Jarvis*, 143
 7. A. by a permanent lease, conveyed a farm to B. reserving all the mill-seats with the privileges thereof. C. purchased the farm of B.; and D., while in possession of the farm under C., entered into an agreement with A., by which A. agreed to permit D. to erect a dam and mill on a creek, within the bounds of the farm conveyed to B. C. afterwards sold the farm, as described in the lease, to E., and D. having quitted possession, E. pulled down the mills erected by him, and D. thereupon brought an action of trespass *quare clausum fregit* against E. It was held, that the entry of D. under the agreement with A., and the erection of the mill, &c. was so far a severance of the freehold, that the mill, thenceforth, became a distinct and separate close, and did not pass to E. by the conveyance of the farm held under the lease; and that D. having the right, the mill, though not in his actual possession, remained his close, for the breach of which he might maintain trespass against E. *Van Rensselaer v. Van Rensselaer*, 377

TREASURY.

Where goods are seized by virtue of legal process, and are in the custody of the law, *treasor* will not lie for them. *Jenner v. Jeliffe*, 381

TURNPIKE.

1. Where a turnpike act (sess. 28. c. 39) exempted a

person "going to and from a blacksmith's shop, to which he usually resorts," from the payment of toll, it was held, that to be entitled to this exemption, the person must go to such blacksmith's shop, for the express purpose of having work done at the time; and that going there with articles to pay for work done at a former time, does not entitle a person to the exemption. *Stratton v. Herrick*, 356

2. Where a turnpike act exempted persons going to their usual blacksmith's shop, &c. from the payment of toll; it was held, that a person who had carried a load of goods to market, and on his return, stopped at the blacksmith's shop, to get work done, was not entitled to the exemption from toll, on his return home. The going to the blacksmith's shop must be the principal, not the incidental business, to bring it within the exemption. *Stratton v. Hubbel*, 357

See CORPORATION.

V

VARIANCE.

In an action of debt against a sheriff for an escape of a prisoner, in his custody, on execution, the plaintiff, in his declaration, alleged a judgment recovered in the Court of Common Pleas, of the term of August, 1807, held at Salem, in the county of Washington, &c. and in the record of the judgment, produced at the trial, the place or town where the court was held, was not mentioned: it was held that the variance was immaterial. *Page v. Woods*, 82

VENUE.

See PRACTICE, 7. 14. 19.

VENDOR AND VENDEE.

See CHANCERY, 7, 8, 9, 10

VESSELS.

See WARDENS OF THE PORT OF NEW-YORK.

W

WARDENS OF THE PORT OF NEW YORK.

A vessel above 50 tons, coming from Connecticut, through the Sound, to the port of New-York, though a registered vessel, and not having a coasting license, yet being actually employed in the coasting trade, is not liable to the penalty given by the 16th section of the act (sess. 34. c. 198) relative to the wardens of the port of New-York, for not being reported to the office of the wardens, within 48 hours after her arrival. *Griswold v. Master and Wardens of New-York*, 76

WARRANTS OF ATTORNEY.

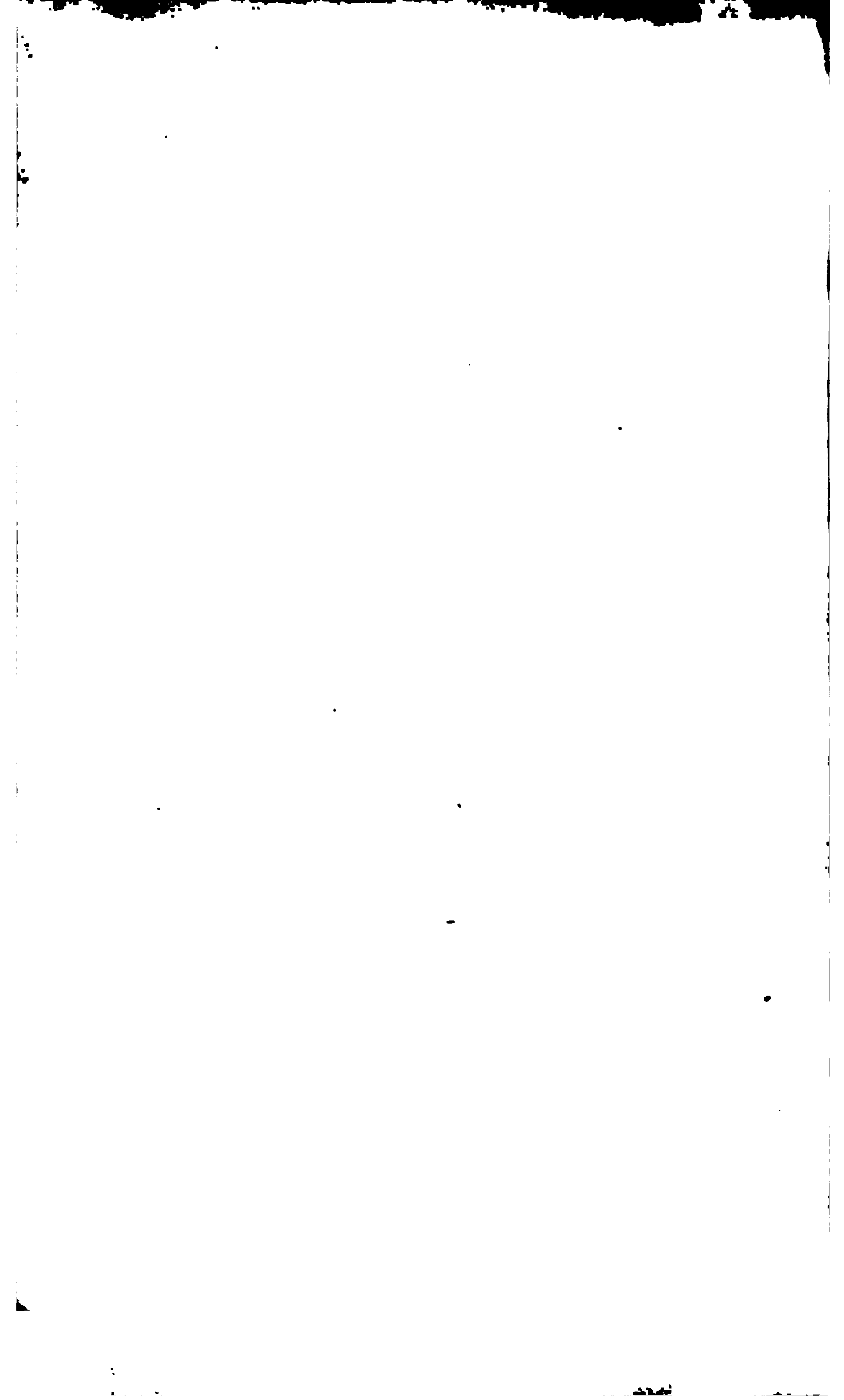
See PRACTICE, 5.

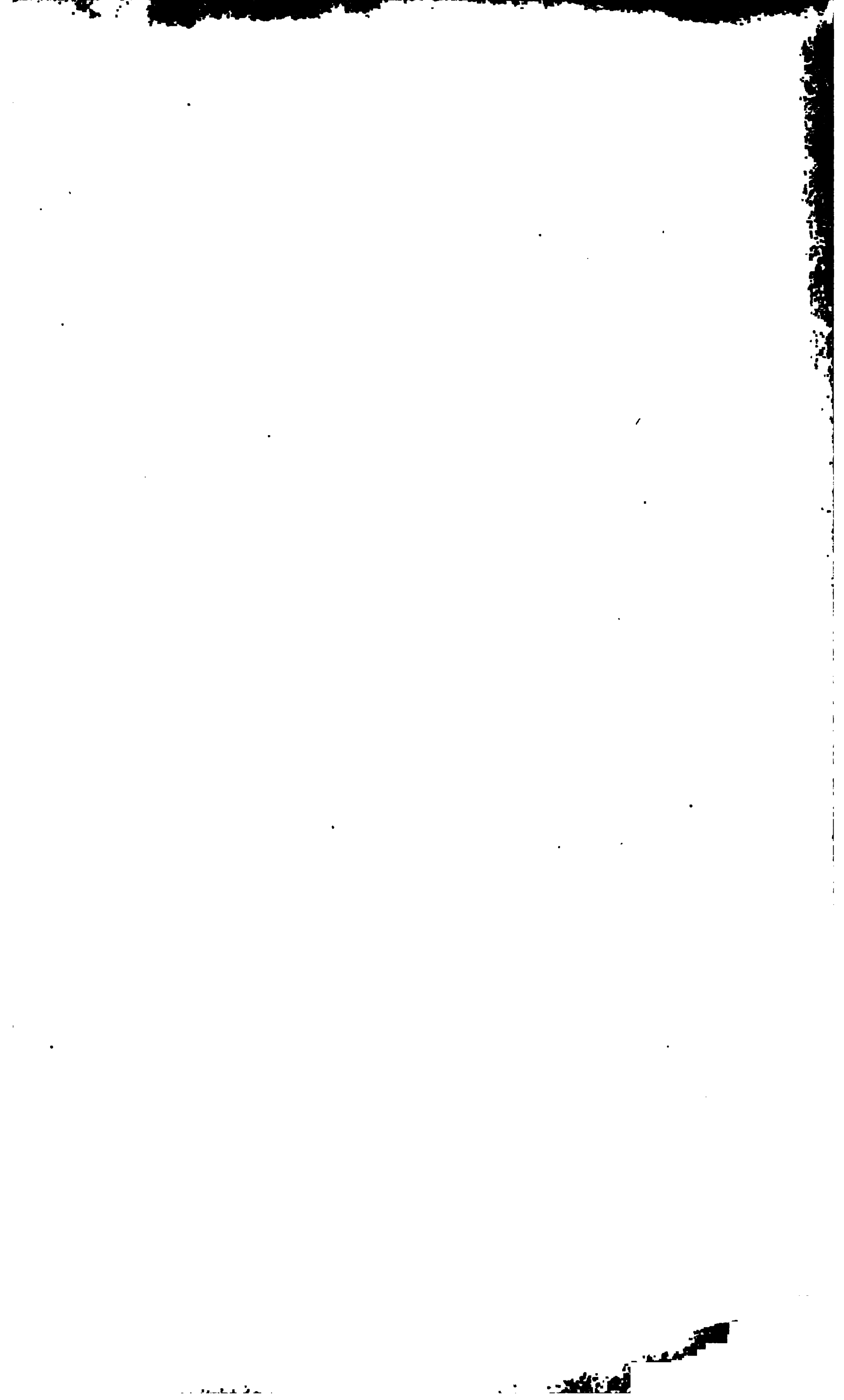
WILL.

See DEVISE.

WITNESS.

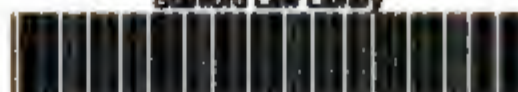
1. A., administrator of B., brought an action of covenant for 100 pounds, against C.; and at the trial, the husband of the intestate was offered as a witness on the part of the plaintiff, and being objected to, he, in consideration of one dollar, executed a lease to the plaintiff, "of all right, &c. to any sum of money which might be recovered in the cause." It was held that C. had an interest in the subject matter of the suit, which might be released; and that the release executed by him was sufficient to extinguish that interest, so as to render him a competent witness. *Woods v. Williams*, 123
2. In a *qui tam* action, to recover a penalty given by the act concerning slaves, a member of the New-York Manumission Society is a competent witness, he being under no legal obligation to contribute to the expenses of the suit, and having no interest in the event of it; and though the witness, on his *voir dire*, said, if the plaintiff should fail, he thought he should, as a member of the society, give something towards compensating the plaintiff, as he usually did in such cases, but he was no way bound to do so, and should be governed only by his general practice and principles. *Gilpin v. Vincent*, 219







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